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Arbitration and Choice: Taking Charge of the "New Litigation" (Symposium Keynote Presentation)

Thomas J. Stipanowich

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Arbitration and Choice: Taking Charge of the “New Litigation” (Symposium Keynote Presentation)

Thomas J. Stipanowich*

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* William H. Webster Chair in Dispute Resolution and Professor of Law, Pepperdine University School of Law; Academic Director, Straus Institute for Dispute Resolution. The author wishes to thank Professor Kathryn M. Dutenhaver and participants in the DePaul Symposium “Winds of Change: Solutions to Causes of Dissatisfaction with Arbitration,” DePaul University College of Law, March 5-6, 2009, and Curt von Kann and members of the College of Commercial Arbitrators Task Force on the Future of Arbitration for giving cause for reflection on this symposium keynote presentation. Thanks also to Pepperdine School of Law Research Librarian Gina McCoy and Pepperdine Law/Straus Institute students Angela Eastman, Jonathan Loch, Paula Pendley and Catie Royal for their valuable research assistance.

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I. INTRODUCTION

Despite meaningful efforts to promote better practices and ensure quality among arbitrators and advocates, criticism of American arbitration is at a crescendo.¹ Much of this criticism stems from standard arbitration procedures that have taken on the trappings of litigation—extensive discovery and motion practice, highly contentious advocacy,

1. See generally Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1 (forthcoming Jan. 2010) available at <http://ssrn.com/abstract=1297526> [hereinafter Stipanowich, *New Litigation*] (analyzing current trends affecting perception and practice in commercial arbitration).

long cycle time and high cost.² While many—perhaps most—business users still prefer arbitration to court trial because of other procedural advantages,³ cost and time concerns usually head the list of complaints about arbitration;⁴ clients and counsel wonder aloud what happened to the economical and efficient alternative to the courtroom of popular lore.⁵ Paradoxically, concerns about the absence of appeal on the merits in arbitration—a fundamental distinction between arbitration and court trial—have caused some to go so far as to craft provisions calling for judicial review for errors of law or fact in awards.⁶

Ironically, even as arbitration is taking on more of the trappings of court trial, court trial itself may change dramatically. A recent study co-sponsored by the American College of Trial Lawyers calls for sweeping reforms in discovery, motion practice, and other contributors to the expense and delay that have crippled the U.S. legal system.⁷

It is time to return to fundamentals in American arbitration. Those seeking economy, efficiency, and a true alternative to the courthouse may need more than good arbitrators. Real change must begin with the commitment of business users to thoughtful, informed consideration of *discrete process choices* that lay the groundwork for a particular kind of arbitration—whether they seek a highly streamlined, short, and sharp process with tight time frames and firmly bounded discovery, a private version of federal court litigation or something in between. Absent specific user guidance, arbitration under modern, broadly discretionary procedures is primarily a product of the interac-

2. *Id.* at 6-27.

3. FULBRIGHT & JAWORSKI, U.S. CORPORATE COUNSEL LITIGATION TRENDS SURVEY RESULTS 18 (2004) [hereinafter FULBRIGHT 2004 SURVEY]; Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work?* 14 CORP. LEGAL TIMES 44, 45 (2004).

4. See, e.g., *System Slowdown: Can Arbitration Be Fixed?*, INSIDECOUNSEL, May 2007, at 51; Lou Whiteman, *Arbitration's Fall from Grace*, LAW.COM IN-HOUSE COUNSEL, July 13, 2006, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=900005457792>; Leslie A. Gordon, *Clause for Alarm*, ABA J., Nov. 2006, at 19. Barry Richard, *Corporate Litigation: Arbitration Clause Risks*, NAT'L L.J., June 2004, at 3. See also Benjamin J.C. Wolf, *On-line But Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 306-07 (2006) (describing the disadvantages of arbitration, including costs similar to litigation and lengthy discovery process and hearings); see also *Mediation—Knocking Heads Together—Why go to court when you can settle cheaply, quickly and fairly elsewhere?*, THE ECONOMIST, Feb. 3, 2000, at 62 (noting arbitration is no “cheaper, fairer or even quicker” than trial).

5. Stipanowich, *New Litigation*, *supra* note 1, at 9.

6. See *infra* Part III.D.

7. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (2009) [hereinafter FINAL REPORT ON LITIGATION REFORM].

tion of advocates (who are often occupationally prone to see only their conflicting agendas) and arbitrators, the best of whom have limited ability to blend efficiency and economy with fundamental fairness without the cooperation of the parties.⁸

For most business users, process choice is an illusion in the absence of appropriate alternative models from arbitration provider institutions.⁹ Clients and counsel tend to have neither the time nor the expertise to craft their own process templates, and usually need straightforward, dependable guidance from those that develop and administer the procedures upon which they rely. Provider institutions are awakening to the need to promote real choices in arbitration, but much remains to be done.¹⁰

Finally, users require arbitrators and advocates capable of and willing to promote the goals underpinning the agreement to arbitrate. Among those who promote themselves to business clients, wide variations exist in personal philosophy, approach, pertinent knowledge, and ability.¹¹ Users must practice greater discernment in their selection.

To help users establish and effectively realize goals in arbitration and dispute resolution, the American College of Commercial Arbitrators established a task force to promulgate simple protocols for business users and other key stakeholder groups.¹² These protocols are not intended as a substitute for the development of appropriate rules or detailed practice guides, nor are they a proxy for the hard business of real choice-making by business clients and counsel. They are, however, an essential first step in refocusing on the fundamentals. This article suggests a possible blueprint for a Protocol for Business Users of Arbitration.

II. WHY BUSINESS USERS COMPLAIN ABOUT ARBITRATION

A. *Arbitration Has Become the "New Litigation"*

In the realm of commercial arbitration, perception, practice, and experience have been shaped by several trends.¹³ The most important of

8. See *infra* Part II.B.5.

9. See *id.*

10. See *infra* Parts III.B., C. (discussing emerging templates for streamlined processes and controlling discovery); Part III.E.1 (discussing selection of institution to provide arbitration services).

11. See *infra* Part III.E.2 (discussing selection of arbitrators and advocates).

12. The author and former judge Curtis E. von Kann are co-chairs of the effort, which will lay the groundwork for a Summit on Commercial Arbitration in Washington, D.C. in October, 2009.

13. See generally Stipanowich, *New Litigation*, *supra* note 1.

these is the expansion of arbitration into the role of full-blown surrogate for civil trial. As a consequence, current practice under modern arbitration procedures is often a close private analogue to civil trial.¹⁴ Among many aspects of this phenomenon, two elements—the expansion of motion practice and discovery—stand out as primary contributors to greater expense and longer cycle time, which are themselves leading causes of complaint by business users of arbitration.¹⁵

The urgency of these concerns was brought home by the publication of a final report co-sponsored by a task force of the American College of Trial Lawyers, which found that “because of expense and delay, both civil bench trials and civil jury trials are disappearing.”¹⁶ The report recommends a wide range of critical changes in the landscape of American litigation, including an end to the “‘one size fits all’ approach of the current federal and most state rules.”¹⁷

It is truly ironic that similar concerns exist in the context of arbitration, which is first and foremost a creature of contract and therefore inherently highly flexible. Expanded arbitral motion practice and discovery have developed within the framework of leading commercial arbitration rules, which typically afford arbitrators and parties considerable “wiggle room” on matters of procedure. While many business clients may be perfectly comfortable with this status quo, in which the character, length and cost of the arbitration process are heavily dependent on the interaction of arbitrators and advocates, others may desire a higher degree of control—or discrete modes of arbitration for different circumstances. For the latter clients, accepting without question a one-size-fits-all set of arbitration rules is tantamount to a forfeiture of their best chance to achieve harmony between process and business priorities.

Let us consider the practical realities causing this state of affairs, and the gap users perceive between expectation and experience.

14. *Id.* See *supra* Part I. Parallel trends include the “quiet revolution” in informal dispute resolution spearheaded by the explosive growth of mediation, which now aggressively competes with arbitration in the dispute resolution marketplace; and the widespread use (and, sometimes, abuse) of arbitration in adhesion contracts binding employees and consumers, and legislative, judicial and scholarly responses that have a “spillover” effect on business arbitration. *Id.* See *supra* Part I.; Part II.

15. *Id.* See *supra* Parts I.B.1., 2.

16. FINAL REPORT ON LITIGATION REFORM, *supra* note 7, at 3.

17. See generally *id.*

B. *Why Business Users Fail to Take Advantage of the Choice Inherent in Arbitration, Leading to a Gap between Expectations and Experience*

Since arbitration is a creature of contract, and therefore wholly subject to the will of business users, one may reasonably wonder why parties should ever perceive a dissonance between their expectations and their actual experience. The reasons are several.

1. Failure to plan with specific business goals in mind

Dissatisfaction with arbitration is, among other things, a reflection of the failure of companies to apply effective business management principles to the handling of business disputes. Arbitration and other dispute resolution approaches are seldom employed in the context of a systematic effort to manage conflict pursuant to clearly defined business goals and priorities. Recent studies of the ways businesses handle conflict make clear that most companies have not embraced this challenge strategically; instead, they are reactive and *ad hoc* in their approach to “legal problems.”¹⁸

Such realities represent a significant missed opportunity for businesses—a failure to procure an important advantage not only for the legal department but for business relationships and, ultimately, the bottom line. Legal issues are a significant factor in the environment of business, demanding around one-fifth of the working hours of leading executives.¹⁹ Yet business managers may not see the strategic implications of conflict and other “legal” matters, instead viewing them as distinct from business operations.²⁰ Similarly, legal counsel may not see how legal disputes impact business operations and strategies.

2. Difficulty of designing an appropriate system prospectively, before disputes arise

Timing is another significant barrier to the exercise of effective choice regarding arbitration. The time to begin laying the groundwork for managing conflict within a contractual relationship is *before* the contract is negotiated and drafted. Because such provisions are usu-

18. See DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES—A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 9-14 (1998); David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 144-45 (1998). See also Thomas J. Stipanowich, *ADR and the ‘Vanishing Trial’: The Growth and Impact of Alternative Dispute Resolution*, 1 J. EMPIRICAL LEGAL STUD. 843, 893 (2004) [hereinafter Stipanowich, *Vanishing Trial*].

19. GEORGE J. SIEDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE 3 (2002).

20. *Id.* at 6.

ally fashioned at the outset, before any disputes have arisen, however, tailoring the “right” process involves a considerable degree of guesswork. Looking ahead to a long-term relationship, one might anticipate conflicts of varying character, size, and complexity; crafting, at the outset, procedures that will prove effective across a range of very different dispute scenarios is a challenging proposition.²¹ Such difficulties often discourage contract drafters from trying to develop tailored arbitration provisions, and encourage reliance on generic boilerplate that postpones many decisions about process until the time of arbitration. Of necessity, such provisions tend to give arbitrators and parties considerable discretion to deal with circumstances as they find them.²²

3. Inexperience of transaction counsel

Yet another obstacle to maximizing the benefits of arbitration is lack of experience among many of those chiefly responsible for contract planning and drafting. Most legal advocates representing business clients now have at least some experience with arbitration, mediation, and other contract-based approaches for resolving conflict, and many of them possess important insights about what kinds of procedures should find their way into commercial contracts.²³ Usually, however, it is not the “advocates” or “dispute resolution specialists” but transactional lawyers who negotiate and draft contracts and establish the template for resolving business conflicts. While one might expect business lawyers’ superior understanding of the business agenda and of the dynamics of commercial relationships to translate into creative contractual provisions governing the management of conflict, this is seldom the case. Although notable exceptions exist, many transactional lawyers have little or no experience in mediation, arbitration, or other forms of dispute resolution.²⁴ This inexperience may be reflected at the drafting stage.

In addition to causing counsel to miss opportunities to take a strong hand in making process choices, lack of pertinent experience and good judgment contribute to bad process choices. Some drafters, fearful that the absence of appeal on the merits will leave their arbitrating client helpless in the wake of an “irrational” award, insert provisions

21. See COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 35-62 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST] (delineating the issues the drafter of an arbitration clause should consider in crafting effective arbitration procedures).

22. *Id.*

23. LIPSKY & SEEGER, *supra* note 18, at 9-14.

24. John M. Townsend, *Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins*, 58 APR DISP. RESOL. J. 28, 30 (2003).

for judicial review for errors of law or fact.²⁵ This costly and potentially perilous “cure” may end up being worse than the perceived malady,²⁶ which is doubly unfortunate since less costly and risky alternatives exist.²⁷

4. Realities of the negotiating process; parties’ differing goals and priorities

While negotiating and drafting business contracts, lawyers and clients often have limited time to address the myriad legal issues surrounding a transaction and tend to give relatively little attention to provisions for managing conflict between contracting partners. Another reason that dispute resolution provisions are usually accorded low priority in negotiations is that parties intent on sealing a deal are reluctant to dwell on the subject of relational conflict.²⁸ Such discussions are usually left until the eleventh hour, with slight emphasis on details.

Getting into the details, of course, raises the possibility that parties’ very different goals and priorities will surface, enhancing the difficulty of completing the present deal or at least complicating the discussion. Under the circumstances, it is only natural that counsel tend to circumvent such discussions by falling back on the most convenient alternative—standard published procedures of leading institutional providers of dispute resolution services.

5. Limited guidance, range of models from arbitral institutions

The published commercial arbitration procedures of major provider institutions offer a number of perceived advantages. For busy lawyers, they offer a seemingly “tried and true” alternative to the minefield of customized drafting combined with an administrative support system and access to lists of neutrals. Unless a client is entering into a significant commercial relationship or preparing a contract template that will be used multiple times,²⁹ it is unrealistic to expect counsel to spend considerable time planning and drafting arbitration agreements. Even in circumstances where more attention is appropriate, drafting dispute resolution agreements from whole cloth without reliance on published templates can be a dicey proposition. It therefore makes

25. See *infra* Part III.D.

26. See *infra* Part III.D.1.

27. See *infra* Part III.D.2.

28. *Id.*

29. See *infra* Part III.A.3 (discussing options for “tailoring” arbitration provisions).

sense to examine and compare what different administrative institutions have to offer.

A reference to standard boilerplate is also much less likely to raise the eyebrows of those on the other side of the negotiating table. To the extent organizations such as JAMS, the American Arbitration Association (AAA), the International Institute for Conflict Prevention & Resolution (CPR) or other national or regional entities are known and respected in the marketplace, incorporating their rules is less likely to entail a drain on negotiators' time or an expenditure of a party's "negotiating points."

But while drafters seeking guidance from the websites of institutions sponsoring arbitration have a seemingly wide variety of choices, few readily available and reliable guideposts exist that dependably link specific process alternatives to the varying goals and expectations parties may bring to arbitration.³⁰ Moreover, despite devoting much time and effort to developing and promoting institutional rules, most organizations offer a limited range of process templates for commercial arbitration. For example, some institutions heavily emphasize a single set of commercial arbitration rules which may be excellent for certain purposes but less advantageous for others (such as small and medium cases); by incorporating that institution's rules in an arbitration agreement, however, parties will be bound to employ those rules for whatever disputes arise.³¹

Recently, more attention is being given to the diverse needs of business users of arbitration. For example, there has been a trend among leading U.S. arbitration institutions to create discrete templates for expedited or streamlined arbitration.³² Moreover, in light of growing concerns about the scope and cost of arbitration-related discovery, va-

30. Leading arbitration institutions provide some basic guidance for drafters about ways of incorporating their own rules in the contract. See, e.g., JAMS, JAMS GUIDE TO DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS (2006), http://www.jamsadr.com/images/PDF/Commercial_Arbitration_Clauses-2006.PDF. One relatively comprehensive set of guideposts for business users is the product of the CPR Commission on the Future of Arbitration. See generally COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21. Even this extensive guide, however, does not approach process questions from the standpoint of various specific user goals. A more recent CPR publication does, however, address many key drafting issues. CPR INST. FOR DISPUTE RESOL., CPR DRAFTER'S DESKBOOK (Kathleen Scanlon, ed. 2002) [hereinafter DRAFTER'S DESKBOOK].

31. See generally Thomas J. Stipanowich, *At the Cutting Edge: Conflict Avoidance and Resolution in the Construction Industry*, ADR & THE LAW 65-86 (1997) (describing rationale for tiered construction procedures) [hereinafter Stipanowich, *Cutting Edge*].

32. See *infra* Part III.B.

rious institutions have devoted attention to that subject, and choices may now be discerned among existing procedures.³³

6. Post-dispute realities; the arbitration spiral

When disputes arise, the expectation of an efficient and economical process may be undermined by the interplay of several factors that cause arbitration proceedings to spiral out of control. Corporate counsel often avoid active responsibility for managing conflict, relying instead on outside advocates. If the latter are not in tune with the client's goals, the consequences may be unfortunate, as reflected in the conclusion of one corporate general counsel:

Arbitration is often unsatisfactory because litigators have been given the keys . . . and they run it exactly like a piece of litigation. It's the corporate counsel's fault [for] simply turning over the keys to a matter.³⁴

As the quote makes clear, some attorneys disserve their clients by failing to appreciate and make appropriate allowances for the significant differences between arbitration and litigation. Of course, the problem may spring from a client's failure to make its needs and expectations plain. It may also reflect the differing interests of the client and outside counsel, especially when the latter is engaged to bill by the hour and is pressured to maximize hours and resulting profits for his law firm.

The most notable impact of a trial-like approach in arbitration involves discovery. Although many arbitrators and some arbitration rules aim to hold the line on excessive discovery,³⁵ it is not unusual for legal advocates to agree to trial-like procedures for discovery, even to

33. See *infra* Part III.C.

34. Stipanowich, *Vanishing Trial*, *supra* note 18, at 895 (quoting Jeffrey W. Carr, Vice President and General Counsel, FMC Technologies, Inc.). See also David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 142 (1998); Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. DISP. RESOL. 1 (1998); John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions* 3 HARV. NEGOTIATION L. REV. 51 (1998).

35. See, e.g., INT'L INST. FOR CONFLICT PREVENTION & RESOL. RULES FOR NON-ADMINISTERED ARBITRATION R. 11 (2007) ("The Tribunal may require and facilitate such discovery as it shall determine is appropriate. . . taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective."), available at <http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx> [hereinafter CPR RULES]. See also JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES R. 22 (2007), available at <http://www.jamsadr.com/rules/comprehensive.asp> [hereinafter JAMS RULES]; AM. ARBITRATION ASS'N COMMERCIAL RULES & MEDIATION PROCEDURES R. R-30 (2007), available at <http://www.adr.org/sp.asp?id=22440> [hereinafter AAA COMMERCIAL RULES].

the extent of employing standard civil procedural rules.³⁶ Trial practice, with its heavy emphasis on pre-hearing motion practice and intensive discovery, is reinforced by ethical rules enshrining the model of zealous advocacy.³⁷ For lawyers accustomed to full-fledged discovery, sufficing with anything less may seem tantamount to malpractice. Again, the heavy-discovery bias tends to be reinforced by the prospect of hefty hourly fees generated by extensive discovery.

Arbitrators, intent upon striking a balance between court-like due process and efficiency, may be reluctant to push parties to limit such practices or to keep to a schedule.³⁸ These tendencies may be strengthened by concerns about having their award subjected to a motion to vacate. The reluctance to limit discovery may also reflect an arbitrator's desire to avoid offending anyone in the hope of securing favorable word-of-mouth and future appointments.³⁹

C. Choice Imperatives

Business users, guided by knowledgeable and experienced counsel, are in the best position to determine how and when arbitration will be brought to bear on business disputes, and the kind of arbitration process to be employed.⁴⁰ If business parties want arbitration to be a truly expeditious and efficient alternative to court, then they have to assume control of the process and not abdicate the responsibility to outside counsel—in other words, principals, and not agents, should act as principals.⁴¹ This must include not only making choices after disputes arise, but also when contracting. Ideally, choice-making begins even earlier with strategic discussions regarding conflict management, in which arbitration is considered among a variety of tools and approaches.⁴²

36. As arbitrator, the author has in past cases been confronted by a prior agreement of counsel for arbitrating parties to utilize the discovery provisions of the Federal Rules of Civil Procedure in arbitration. It is often possible to persuade the parties to forego requests for admission and interrogatories and to strictly limit the number of depositions, and also to closely supervise the discovery process to avoid unnecessary delays.

37. See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2007) [hereinafter MODEL RULES].

38. See *id.* (discovery has been used as a tactical weapon to impose excessive costs on the opposing party).

39. See Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 717 (2004) (arguing that arbitrators may be less restrictive with discovery than judges because of their concern over obtaining future appointment as an arbitrator).

40. This paragraph is a close paraphrase of a paragraph in Stipanowich, *New Litigation*, *supra* note 1, at 8.

41. Cf. BENJAMIN SILLS, *THE SOUL OF THE LAW* 88 (1994).

42. See generally SIEDEL, *supra* note 19.

In the effort to define client goals and translate these goals into meaningful process choices, counsel plays a critical role. As “gate-keeper[s] to legal institutions and facilitator[s] of . . . transactions,”⁴³ lawyers “exercise considerable power over their clients . . . [and] maintain control over the course of [dispute resolution].”⁴⁴

Despite the often daunting obstacles confronting client and counsel in making better choices regarding arbitration and dispute resolution, legal advisors should devote more time and energy to overcoming current obstacles, and business clients should take heed and support these efforts. Effective process choices provide tangible benefits for businesses and avoid costly and delay-producing legal consequences. These realities underpin lawyers’ ethical obligations to actively promote consideration of choices regarding arbitration.

1. Business imperatives

When utilized by a legal department as part of a strategic effort to serve broader business goals, arbitration and other forms of dispute resolution may benefit a company. A 2003 AAA-sponsored market study involving telephone interviews with 254 corporate counsel sought to segregate and compare companies based on indices of several key characteristics.⁴⁵ The study analyzed companies in which legal staff is more closely integrated into the corporate planning process, where senior management is focused on preserving relationships and settling cases instead of adopting aggressive approaches, and litigation is downplayed in favor of alternative dispute resolution approaches.⁴⁶ It concluded such companies are likely to enjoy strengthened relationships with suppliers and business partners and have legal departments that perceive themselves as less “stretched” to accomplish their role within a given budget.⁴⁷ A strategic approach that effectively integrates arbitration processes into a larger matrix of approaches to manage and resolve conflict in accordance with broader business goals is arguably an effective way of ensuring that goals and expectations are achieved.

Several recent surveys of corporate counsel demonstrate that while many corporate counsel perceive arbitration as presenting key advan-

43. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC. REV. 631, 645 (1980-81).

44. *Id.*

45. AMERICAN ARBITRATION ASSOCIATION, DISPUTE-WISE BUSINESS MANAGEMENT—IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS 4 (2003).

46. *Id.* at 8.

47. *Id.*

tages over litigation, many corporate lawyers are dissatisfied with arbitration, often because of related costs and delays.⁴⁸ Sophisticated guidance is needed on how and when to resort to arbitration, and what procedures are best for specific circumstances. Without such direction, a client risks, among other things, unforeseen legal consequences.

2. Legal imperatives

Choices regarding arbitration—whether made consciously or by default—have potentially significant legal consequences for clients. The published cases and literature are replete with examples of parties experiencing disappointment, delay, or disruption prior to, during, or after arbitration as the result of:

- a lack of precision in describing the process, and confusion about whether a particular agreement is enforceable under arbitration statutes;⁴⁹
- uncertainty about the consequences of a failure to follow prescribed steps in a dispute resolution process;⁵⁰
- a lack of clarity about whether various issues are to be resolved by courts or arbitrators;⁵¹
- a multi-party dispute in which some of the parties in interest are not subject to an arbitration clause;⁵²

48. See Stipanowich, *New Litigation*, *supra* note 1, Part I.D. See also FULBRIGHT 2004 SURVEY, *supra* note 3, at 18. FULBRIGHT & JAWORSKI L.L.P., FOURTH ANNUAL LITIGATION TRENDS SURVEY FINDINGS 18, 30 (2007), available at <http://www.fulbright.com/mediaroom/files/2007/FJ6438-LitTrends-v13.pdf>; Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, DISP. RES. J., Feb.-Apr. 2003, at 37, 38 (noting that arbitration has become a legalistic method of adjudication); Michael T. Burt, *The Truth About ADR: Do Arbitration and Mediation Really Work?* 14 CORP. LEGAL TIMES 44, 45 (2004). See generally QUEEN MARY, UNIV. OF LONDON, SCH. OF INT'L ARBITRATION & PRICEWATERHOUSE COOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 22 (2006) (expense and time were seen as the leading disadvantages of international arbitration); QUEEN MARY, UNIV. OF LONDON, SCH. OF INT'L ARBITRATION & PRICEWATERHOUSE COOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 5 (2008) (5% of counsel were "rather or very disappointed" with international arbitration, based on their experience of increased costs of arbitration and delays to proceedings).

49. Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L. J. 427, 450-56 (2007) (discussing basis for enforcement of non-binding arbitration and one-off dispute resolution provisions).

50. *Id.* at 457-62 (discussing multi-step processes and "interface" issues).

51. *Id.* See also IAN R. MACNEIL, et al., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 36.5.5 (1996) (discussing jurisdictional issues that come into play with ongoing contracts concerning relief).

52. Robert W. DiUbaldo, *Evolving Issues in Reinsurance Disputes*, 35 FORDHAM URB. L.J. 83, 84-89 (2008) (providing an overview of the consolidation issue as treated across the circuit courts); *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580 (3d Cir. 2007) (Petitioner argued demands for arbitration against it should be stayed, as six separate contracts, each with its own arbitration clause, did not provide for the consolidation of arbitra-

- a lack of understanding about the roles of party-appointed arbitrators and their obligations to disclose conflicts of interest;⁵³
- a concern about the amount and form of discovery;
- a failure to provide effective protection for trade secrets and other proprietary information;⁵⁴
- a failure to foresee the potentially negative consequences of a customized provision for expanded or contracted judicial review of an award.⁵⁵

In all of these situations, unanticipated litigation or other complications may be avoided by careful planning, which in some cases means looking beyond the standard procedures provided by arbitration institutions.⁵⁶ However, we are not to the point where even a sizable minority of practitioners have the knowledge and experience to offer effective guidance on such issues.⁵⁷ Whether or not arbitration would be judicially denominated a “specialty,”⁵⁸ it has become a relatively complex and specialized area of practice. An effective counselor

tion proceedings, or for consolidation with proceedings under other contracts. In light of the parties’ agreement to arbitrate their disputes, contractual silence as to the consolidation issue, and “longstanding federal policy favoring arbitration” the court held that the decision whether to consolidate was a procedural issue to be resolved by the arbitrator (citing *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)). See also *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573 (7th Cir. 2006) (holding that the question of whether an arbitration agreement between reinsurer and reinsured prohibited consolidated arbitration with other reinsurers was a procedural issue for the arbitrator and not a question of arbitrability for the court).

53. *Delta Mine Holding Co. v. AFC Coal Properties, Inc.*, 280 F.3d 815 (8th Cir. 2001), *cert. denied*, 123 S. Ct. 87 (2002); *Merit Ins. Co. v. Leatherby Ins. Co.* 714 F.2d 673 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983) (standards of disclosure applied to party-appointed arbitrators depend on the tradeoff between expertise and impartiality).

54. See *Merrill Lynch v. McCollum*, 469 U.S. 1127, 1129 (1985); Anahit Tagvoryan, *A Secret in One District Is No Secret in Another: The Cases of Merrill Lynch and Preliminary Injunctions under the FAA*, 6 PEPP. DISP. RESOL. 147 (2006) (“Because jurisdictions are split as to whether courts have authority under the FAA to grant injunctive relief in a dispute that is subject to arbitration, Merrill Lynch has experienced unnecessary confusion as to where, when, and how its trade secrets are protected.”); but cf. *IBM & Gartner Group Settle Trade Secret Suit by Creating Future Arbitration Panel*, ALTERNATIVES TO THE HIGH COST OF LITIG., Sept. 1984, at 8.

55. See *infra* Part III.D. See also Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality through Functional Analysis*, 37 GA. L. REV. 123, 168 nn.269 & 270 (2002) [hereinafter Schmitz, *Mud Bowl*].

56. See Howard J. Aibel & George H. Friedman, *Drafting Dispute Resolution Clauses in Complex Business Transactions*, 51 DISP. RESOL. J. 17, 68 (1996).

57. See generally Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorneys’ Duty to Learn about ADR and What They Must Learn*, 1999 J. DISP. RESOL. 29 (1999); Ronald J. Offenkrantz, *Negotiating and Drafting the Agreement to Arbitration in 2003: Insuring Against a Failure of Professional Responsibility*, 8 HARV. NEGOT. L. REV. 271 (2003).

58. See RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* 2:32 (2008 ed.) (legal specialization is a significant factor in malpractice litigation, usually requiring a higher standard of care and expert testimony).

should draw upon a well of direct experience and an understanding of current case law, procedural options, and applicable standards.⁵⁹

3. Ethical imperatives

To help their clients achieve legitimate business goals and avoid unfortunate legal consequences, lawyers have ethical obligations to competently counsel their clients about the range of appropriate methods of managing and resolving conflict in particular transactions or relational settings.⁶⁰ This requires not only the requisite “legal knowledge, skill, thoroughness and preparation,”⁶¹ but also an understanding of the client’s objectives⁶² and how arbitration and dispute resolution tools may serve them.

59. Modern listserves are becoming an important source of information for neutrals and practitioners in arenas such as arbitration and dispute resolution. Every day, the author receives multiple messages regarding new decisions, new or changing practice standards and other important developments.

60. See MODEL RULES, *supra* note 37, at R. 1.1; See Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in DEBORAH L. RHODE, *ETHICS IN PRACTICE* 136 (2000). Some legislation and bar opinions have established a specific predicate for lawyer consultations regarding dispute resolution options. Some establish an affirmative duty to provide clients with information regarding alternatives to litigation. A Michigan Bar opinion states:

[A] [l]awyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client’s interests, or if the lawyer has any reason to think that the client would find the alternative desirable While not all options which are theoretically available need be discussed, any doubts about whether a possible option is reasonably likely to promote the clients (sic) interests, as well as any doubt about whether the client would desire the use of any particular option, should be resolved in favor of providing the information to the client and allowing the client to render a decision.

Mich. Comm. on Ethics and Professional Responsibility, Formal Op. RI-262 (1996).

The Texas Lawyer’s Creed provides: “I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.” TEXAS LAWYER’S CREED § 2(11) (1989). The Georgia State Bar Rules and Regulations state:

A lawyer as adviser has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation.

Ga. Rules & Regulations for the Org. and Gov’t of the State Bar of Ga. R. 3-107, EC 7-5 (1999). See generally Robert F. Cochran, *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183, 188 (1999) [hereinafter Cochran, *ADR*].

61. According to the Model Rules of Professional Conduct,

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

MODEL RULES, *supra* note 37, at R. 1.1.

62. MODEL RULES, *supra* note 37, at R. 1.2(a) (requiring lawyers to “consult with the client as to the means by which . . . [client objectives] are pursued”).

Today, contractual provisions for the resolution of disputes, including terms for binding arbitration, are a regular feature of all kinds of contracts. If the objective of representation is to negotiate or draft a contractual agreement in furtherance of business goals, the management of disputes may be an important element, although it is unlikely to be uppermost in a client's mind during the negotiation. Indeed, clients tend to shove it into the background of discussions, postpone its treatment until the very last moment, or avoid discussing it entirely.⁶³ It is incumbent upon the legal advisor to draw the subject to the client's attention in a timely manner (meaning, if at all possible, prior to the negotiation) for "reasonable consultation" as to the means by which the client's objectives will be accomplished.⁶⁴

Moreover, it is unreasonable to expect business clients to have the specialized knowledge and skill required to craft such provisions, and they should be able to rely upon legal counsel when making decisions about how disputes should be handled.⁶⁵ Although a basic understanding of dispute resolution choices may be straightforward,⁶⁶ a knowledgeable appraisal of choices in binding arbitration is beyond most clients' ability and requires counsel's interpretation and guidance.

To provide competent representation to their clients, counsel representing clients in the negotiation and drafting of agreements must come equipped with knowledge of a wide variety of conflict resolution

63. See *supra* Part II.B.4.

64. ABA Model Rule 1.4 provides:

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; . . .
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

MODEL RULES, *supra* note 37, at R. 1.4 The Rules further explain,

As used above, "informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

MODEL RULES, *supra* note 37, at R. 1.0(e).

65. Comment 2 to Model Rule 1.2 provides:

Clients normally defer to the special knowledge and skill of their lawyer with respect to . . . technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

MODEL RULES, *supra* note 37, at R. 1.2 cmt.

66. See, e.g., Cochran, *ADR*, *supra* note 60, at 186.

mechanisms including stepped negotiation, mediation, and arbitration. This should include not only an appreciation of the array of different processes and their appropriate uses, but also thorough preparation to ensure that a dispute resolution provision (which today is likely to include multiple elements) is tailored to the client's particular needs and circumstances. Competent representation requires more than just grabbing boilerplate provisions from the website of an institutional provider. To the extent that the negotiator/drafter lacks the background or skills necessary to make a wise and judicious choice, he or she should seek assistance from a more experienced colleague⁶⁷ or other appropriate source.

Lawyer-counselors are also encouraged to look beyond the legal issues and consider "other factors that may be relevant to the client's situation."⁶⁸ In crafting appropriate dispute resolution provisions, or in some cases whole "systems" for the resolution of disputes, one has the opportunity to look beyond the narrow resolution of legal or factual disputes and the remedial shortcomings of litigation. An attorney can craft frameworks that permit conflict to become the impetus for a consideration of business and personal objectives and relational issues that both underpin and transcend "mere" legal or factual disputes. Within and beyond the realm of arbitration, parties have a variety of process choices that serve various goals and priorities—subjects that should be addressed in advance by lawyer and client. Failure to allow the client the opportunity to consider these factors is a breach of ethical duty.⁶⁹

67. Thomas J. Stipanowich, *Vanishing Trial*, *supra* note 18, at 893 n.195 (quoting CPR Commission member Harold Hestnes).

68. The Model Rules provide:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

MODEL RULES, *supra* note 37, at R. 2.1.

Comment 5 to Model Rule 2.1 provides:

[W]hen a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

MODEL RULES, *supra* note 37, at R. 2.1. cmt.

69. See generally Robert F. Cochran, *Professional Rules and ADR: Control of Alternative Dispute Resolution under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L. J. 895, 898-901 (2001). In the absence of contractual agreements for managing disputes, it is increasingly likely that parties will end up in some form

III. FIRST PRINCIPLES: A PROTOCOL FOR ARBITRATION REFORM THROUGH CHOICE

Business users perceive a gap between expectation and experience in arbitration. In particular, because practice under prevailing general commercial arbitration procedures has become much more “court-like,”⁷⁰ some business users complain about high costs and delays. For this and other reasons, users would be better off if they made better choices—and especially by more effectively tailoring arbitration to their own goals and priorities—at the outset, when the template for dispute resolution is usually established. While this path is strewn with a number of daunting practical obstacles, there are also strong business, legal, and ethical imperatives for pursuing it. The challenge is to encourage and facilitate more affirmative, beneficial choice-making by business users in a pragmatic and realistic way. The following Protocol is a first effort in that direction. Due to space limitations, the following discussion is aimed primarily at addressing concerns about the loss of economy and efficiency in arbitration.⁷¹

A. *Move Beyond “One-Size-Fits-All Arbitration” to Fit Process to Priorities*

1. Identifying client goals and priorities

Experts in the development of integrated programs for managing and resolving conflict maintain that organizations should begin efforts to manage conflict by articulating the goals the program will serve.⁷² This approach underpins leading corporate employment programs.⁷³ As discussed above, however, such thinking is not often carried over

of court-connected mediation or ADR process. In such cases key decisions about the scope and shape of the process may be out of the parties' hands.

70. Benjamin J.C. Wolf, *On-line But Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 306-07 (2006) (describing the disadvantages of arbitration to include costs similar to litigation and lengthy discovery process and hearings); see also Elena V. Helmer, *International Commercial Arbitration: Americanized, “Civilized,” or Harmonized?* 19 OHIO ST. J. ON DISP. RESOL. 35 (2003) (discussing perceptions of the American influence on international arbitration); Amr A. Shalakany, *Arbitration and the Third Work: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L. J. 419, 434-435 (2000) (observing that international arbitration is no longer quicker than adjudication; suggesting that “American law model” is a cause).

71. A more extensive protocol would include guideposts and detailed discussion of third party discovery, multi-party practice, the protection of confidentiality, and other topics that would require many more pages than are available here. Some of these subjects are alluded to briefly in the text accompanying notes 75-79 *infra*.

72. See, e.g., CATHY A. COSTANTINO & CHRISTINA S. MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* 168-71 (1996).

73. *Id.*

into the management of commercial disputes. In that arena, dispute resolution is typically given short shrift, and gaps are filled by incorporating the standard arbitration procedures of leading provider institutions.

Although prevailing commercial arbitration procedures are usually the product of considerable thought and discussion by very bright, experienced, and thoughtful people (including leading lawyers and, in some organizations, non-lawyers), no single set of commercial arbitration procedures can effectuate all of the goals that are important to business users in different kinds of cases. Consider the following list of ends that may be sought by businesses in dispute resolution: low cost or cost efficiencies; a speedy outcome or the avoidance of undue delay; the ability to choose decision makers; court-like due process or results comporting with legal standards; application of pertinent commercial, technical or professional standards; a final and binding resolution; predictability; limited risks; consistency of outcomes; privacy; confidentiality; and preservation of a relationship or continuing performance. In addition, the ability to exert control over the process and the flexibility to address different circumstances is important.

As previously discussed, “one-size-fits-all” arbitration rules are (of necessity) designed to accommodate a wide range of possible circumstances, and therefore afford arbitrators and parties a considerable degree of “wobble room.” Advocates and arbitrators determine the shape and pace of the process, the degree of protection to be afforded sensitive information, and other specific contours of arbitration. This approach necessarily heightens uncertainties and enhances the risk that particular user goals may be frustrated. It often, moreover, results in an experience that closely resembles litigation.⁷⁴

A recent final report on litigation reform recognizes that the “one-size-fits-all” approach embodied in federal and state court procedures has contributed significantly to costs and delays, and says “rulemakers should have the flexibility to create different sets of rules for certain types of cases so [the cases] can be resolved more expeditiously and efficiently.”⁷⁵ If trial lawyers recognize the need for new models of court trial to promote economy and efficiency, why are business users not taking advantage of the choice inherent in arbitration to adopt streamlined procedures?

To exert greater control over their destiny in arbitration, business clients and counsel need to recognize and address critical “forks in the

74. See *supra* Part II.B.

75. FINAL REPORT ON LITIGATION REFORM, *supra* note 7, at 4.

road” through clear process choices. For example, in making choices about arbitration, users might ask themselves at least a few key questions:

- Is low cost and a speedy outcome more important than court-like due process, justifying expedited, or streamlined procedures in certain categories of cases?⁷⁶
- Is it possible to generally limit arbitration-related discovery? Can we set narrow bounds for discovery in certain types of cases?⁷⁷
- Is an arbitrator other than a legal professional more appropriate in certain kinds of disputes?
- If there is a serious concern about the impact of a final award and the absence of judicial scrutiny, what are the most cost-effective and beneficial ways of addressing the concern?⁷⁸
- Is there a need to ensure that three or more parties are included in (and bound by) the results of the dispute resolution process, and will special provisions need to be made for consolidated arbitration or joinder of parties?
- Are certain categories of proprietary information likely to be relevant to disputes under the contract? If so, what confidentiality protections should be included in the initial dispute resolution clause?⁷⁹
- If preservation of a relationship or maintenance of contract performance is a priority, how should the arbitration process be tailored to reflect that concern?⁸⁰

Questions such as these (several of which will be discussed at greater length below) are critical to translating client priorities into effective approaches to conflict. Planners without dispute resolution experience should draw upon more knowledgeable colleagues or outside counsel with broad conflict management experience.

2. Considering arbitration as part of a systematic approach to conflict management

A number of companies have embraced systematic approaches to handling conflict. They have articulated business goals to be achieved in their program, developed effective mechanisms for the early assessment and affirmative management of conflict,⁸¹ and promoted various

76. See *infra* Part III.B.

77. See *infra* Part III.C.

78. See *infra* Part III.D.

79. See *infra* text accompanying notes 193-200 (briefly discussing confidentiality concerns and potential need for affirmative protection of sensitive information in arbitration).

80. See, e.g., *infra* text accompanying notes 81-92 (discussing Abbott Labs procedure for distribution contracts).

81. See Stipanowich, *Vanishing Trial*, *supra* note 18, at 883-93 (discussing sophisticated corporate conflict management programs).

appropriate dispute resolution tools (including negotiation, mediation, and arbitration).⁸² Approached in this way, as part of a thoughtful and multi-faceted approach to resolving conflict, binding arbitration is more likely to prove its particular value as a response to business needs and priorities.

3. Custom-tailoring arbitration

a. customization at the contract level

In order to ensure that arbitration is most effectively employed as part of a systematic approach to conflict, counselors should take time to consider what kind of arbitration procedure will best serve the goals of a client. The result may be the adoption or adaptation of standard arbitration and dispute resolution procedures (including national models published by JAMS, CPR, or AAA). Some businesses, however, may find it worthwhile to develop their own “dedicated” dispute resolution models. This latter approach is cost-effective in the context of a high-stakes commercial relationship, a repeatedly used contract template, or a stream of prospective disputes.

A form of expedited arbitration⁸³ emphasizing speed and certainty for the resolution of disputes arising under long-term distributorship contracts was pioneered by Abbott Labs, a Chicago-based corporation. The mechanism was embodied in an “Alternative Dispute Resolution” program, a stepped program analogous to those featured in many other business contracts.⁸⁴ However, for the Abbott business clients, the critical goals and expectations were speed, certainty, and the maintenance of continuing business relationships. It was essential for the parties to have guidance respecting the basis of their ongoing relationship under the distributorship contract, and they needed a decision “sooner rather than later.” Abbott planners concluded that substantial time could be saved by eliminating discovery, since, as one of the program architects observed, “ninety-nine percent of the time you will not find something as a result of time-consuming and expensive

82. See *id.* at 884. See also Stipanowich, *New Litigation*, *supra* note 1, at Part II.E. (discussing the “movement upstream” in corporate conflict management). By way of comparison, the Final Report on Litigation Reform calls to courts to “raise the possibility of mediation or other forms of alternative dispute resolution early in appropriate cases,” including mediation of individual issues FINAL REPORT ON LITIGATION REFORM, *supra* note 7, at 21.

83. The “ADR” procedure nowhere specifically identifies the adjudicative process as “arbitration,” but the latter fulfills all the requisites of “classic” binding arbitration. See Stipanowich, *Arbitration Penumbra*, *supra* note 49, at 435-36.

84. Abbott Labs, Dispute Resolution Program [hereinafter Abbott Program] (on file with author).

discovery—a real waste.”⁸⁵ Therefore, the Abbott model was aimed at “thin-slicing”⁸⁶ by limiting adjudication largely to the information at hand. As such, the procedure was a dramatic departure from the instinct of many advocates in the professional legal culture who seek “perfect information” before deciding how to dispose of the case. The Abbott program is characterized by (a) a very short period before arbitration hearings, (b) a prohibition on discovery, (c) a requirement that each party have no more than five hours to present its case in the arbitration hearing, and (d) a baseball arbitration-type format in which the arbitrator’s award must be based upon the proposal of one or the other of the disputants.⁸⁷

Following the submission of written notice of a dispute, the Abbott procedure requires “good faith negotiations” between the “presidents (or their designees) of the affected subsidiaries, divisions, or business units” within twenty-eight days. Failing resolution through negotiation (including the failure of the principals to negotiate), the procedure calls for the appointment of a neutral “to preside in the resolution of disputes.”⁸⁸ Between twenty-eight and fifty-six days after selection, the neutral must “hold a hearing to resolve each of the issues identified.”⁸⁹ The parties then submit lists of exhibits and witnesses, a proposed ruling on each issue to be resolved, and a brief of no more than twenty pages in support of their proposals. No discovery is “required or permitted by any means.”⁹⁰ The hearing is to be “conducted on two consecutive days,” with five hours allotted to each party for presentation. The award must be published within fourteen days after completion of the hearing, and must “adopt in its entirety the proposed ruling

85. Lara Levitan, Senior Counsel, Abbott Labs, Presentation at the CPR Institute for Dispute Resolution Annual Meeting: Corporate Counsel Roundtable on Commercial Arbitration (Jan. 2005) (notes on file with author). See also Russ Bleemer, *High Quality Results, High Quality Processes: Top In-House Counsel Discuss the Continuing Challenges In Commercial Arbitration*, 24 ALTERNATIVES TO THE HIGH COST OF LITIG. 182 (2006) (discussing the roundtable).

86. Bleemer, *supra* note 85, at 183.

87. In other words, the arbitrator must choose the more “just” proposal and incorporate it in his or her decision, which will be legally binding.

88. Bleemer, *supra* note 85, at 183. The neutral selection process is required to begin within 21 days of the notice of dispute, and, in the absence of mutual agreement on a neutral, is to be conducted under the auspices of the CPR Institute for Dispute Resolution [now the International Institute for Dispute Resolution]. In 2007, Abbott further refined its standard provision to keep the selection of the neutrals squarely in the hands of the parties, i.e. if the parties cannot agree to one mutually acceptable independent, impartial and conflicts-free neutral, each party chooses one independent, impartial and conflicts-free arbitrator and those two arbitrators choose a third such neutral for the panel.

89. Bleemer, *supra* note 85, at 183.

90. Bleemer, *supra* note 85, at 183.

and remedy of one of the parties on each disputed issue.”⁹¹ If all rulings are in favor of the same party, the losing party must pay all fees and expenses of the proceeding, including the reasonable legal fees of the prevailing party.⁹² Although enforceable in court, the rulings of the neutral and allocation of fees and expenses are “binding, non-reviewable, and non-appealable.”⁹³

While the foregoing procedure is particularly draconian and therefore not a suitable template for general purposes, the process served its particular purpose well. Although Abbott was not always successful in persuading distributorship contract partners to agree to the expedited process, the program has been successfully employed in contractual relationships.⁹⁴

Several points are worth stressing about the Abbott Labs procedure:

- 1) the program was narrowly tailored for a specific, common transaction type—distributorship contracts;
- 2) Abbott designed the program in advance of any specific negotiations with contracting partners;
- 3) Abbott first identified key corporate goals and priorities (speed, economy, a quick answer, a preserved relationship), and then tailored the process to those ends;
- 4) although this was a highly abbreviated process, Abbott considered and incorporated multiple dispute resolution steps; and
- 5) Abbott made limited use of an appropriate “provider organization”—in this case the CPR Institute—to assist with arbitrator selection.

b. customization by industry, trade, or professional group

Another form of customized program is that developed by and for a specific industry, mercantile group, or professional association.⁹⁵

91. Bleemer, *supra* note 85, at 183.

92. Bleemer, *supra* note 85, at 183.

93. It should be noted that there is a division of judicial opinion regarding the enforceability of agreements to *limit* or *avoid* judicial review. Some courts have enforced such agreements. *See, e.g., Hoeft v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003) (contractual limitation of bases for vacatur to exclude “manifest disregard” was unenforceable; “Judicial standards of review, like judicial precedents, are not the property of private litigants.”). Others courts have denied enforcement. *See, e.g., Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001), *cert. denied*, 534 U.S. 1020 (2001); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir. 2001) (noting in dicta that “parties to an arbitration agreement may eliminate judicial review by contract”).

94. Levitan, *supra* note 85. (Lara Levitan, senior counsel at Abbott Laboratories, makes recommendations based on her company’s arbitration program); *see also* Bleemer, *supra* note 85.

95. *See* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 431 n.24, 453-77 (1988) [hereinafter Stipanowich, *Rethinking*] (discussing construction industry arbitration procedures and summarizing other studies on trade and industry arbitration programs).

These programs, many of which have long historical roots, incorporate a diverse array of arbitration processes tailored to particular kinds of disputes. For example, in the sale of thoroughbreds, bidding disputes might be adjudicated by the decision of an auctioneer,⁹⁶ and warranty-related controversies by a panel of veterinarians.⁹⁷

The AAA Construction Rules, which were developed with input from design and construction professionals as well as attorneys, offer three “tiers” of procedure corresponding to the amount in controversy.⁹⁸ The AAA framework provides that claims of no more than \$75,000 will be addressed through Fast Track Procedures featuring a single arbitrator, a presumption of no discovery, and tight timetables.⁹⁹ At the other end of the spectrum are Rules for Large, Complex Cases, which are triggered whenever claims exceed \$500,000.¹⁰⁰ Again, the arbitration provisions are published with mediation procedures, encouraging planners and drafters to consider both processes.¹⁰¹

B. *Make Clear Choices Regarding Limits on Cycle Time and Process*

1. The tension between economy and other goals

The conventional expectation is that arbitration proceedings will be conducted without unnecessary delay or expense.¹⁰² There is abiding tension between these prospects and the expectations of “due process”—particularly when the measuring stick for the latter is litigation. Accommodating these competing expectations in discrete cases is per-

96. See, e.g., CANADIAN THOROUGHBRED HORSE SOCIETY (ONTARIO DIVISION), CANADIAN-BRED YEARLING SALE (Sept. 2, 2008), http://www.cthsont.com/docs/sales/13168_YearlingSaleIntro.pdf.

97. See *id.* By way of contrast, the Bloodstock Agent Code of Conduct Dispute Resolution Process provides for arbitration under the rules of the American Arbitration Association. See Sales Integrity Program, <http://www.salesintegrity.org/bloodstock-agent-code-buyer.html> (last visited Apr. 27, 2009).

98. AM. ARBITRATION ASS'N CONSTR. INDUS. ARBITRATION RULES AND MEDIATION PROCEDURES (2007) [hereinafter AAA CONSTR. RULES], available at <http://www.adr.org/sp.asp?id=22004>.

99. *Id.* at R. F-1-F-13.

100. *Id.* at R. L-1-L-4.

101. *Id.* at R. M-1-M-17. See Stipanowich, *Cutting Edge*, *supra* note 31, 75.

102. See Stipanowich, *Rethinking*, *supra* note 95, at 429. See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (“[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies.”); Curtis E. von Kann, *Not So Quick, Not So Cheap*, 27 LEGAL TIMES 38 (2004) (describing “rough justice” of traditional commercial arbitration).

haps the greatest challenge for drafters of arbitration and dispute resolution provisions, since the balance will be struck differently depending on the circumstances. Unless they are content to leave the matter to the discretion and interaction of arbitrators and counsel, however, parties desiring to promote efficiency and economy in arbitration should consider including specific provisions for the purpose.

2. Expedited or streamlined rules and their key features

Mounting concerns about arbitration costs and delays have triggered efforts to develop templates for expedited or “streamlined” forms of arbitration. A forerunner of current efforts to produce “tighter packaging and earlier resolution” was the Expedited Arbitration Procedures published as a part of the American Arbitration Association’s multi-tiered procedures for construction disputes;¹⁰³ similar rules were later developed for commercial disputes.¹⁰⁴ JAMS now publishes Streamlined Arbitration Procedures alongside its Comprehensive Arbitration Procedures¹⁰⁵ (with specialized streamlined procedures for construction cases¹⁰⁶). The International Institute for Conflict Prevention & Resolution (CPR) recently published Expedited Construction Arbitration Procedures¹⁰⁷ and is developing “Global Rules for Expedited Arbitration.”¹⁰⁸ Although all of these procedures place heavy emphasis on speed, they also exhibit significant differences.

a. Scope of application

Given general concerns about procedural fairness and the strong emphasis on court-like due process, it is hard to imagine business users agreeing to tightly circumscribed procedures for all disputes arising under or relating to a commercial contract, regardless of size, complexity and subject matter. With this in mind, the AAA Expedited

103. See AAA CONSTR. RULES, *supra* note 98, at R. F-1-F-13.

104. AAA COMMERCIAL RULES, *supra* note 35, at R. E-1-E-10.

105. JAMS STREAMLINED ARBITRATION RULES & PROCEDURES (2007) [hereinafter JAMS STREAMLINED RULES], available at <http://www.jamsadr.com/rules/streamlined.asp>.

106. JAMS ENG’G & CONSTR. ARBITRATION RULES & PROCEDURES FOR EXPEDITED ARBITRATION (2008) [hereinafter JAMS ENG’G/CONSTR. EXPEDITED RULES] (on file with author).

107. INT’L INST. FOR CONFLICT PREVENTION & RESOL. EXPEDITED ARBITRATION OF CONSTR. DISPUTES (2006) [hereinafter CPR EXPEDITED ARBITRATION], available at <http://www.cpradr.org/ClausesRules/ExpeditedArbitrationofConstructionDisputes/tabid/82/Default.aspx>. See also IAMA ARBITRATION RULES INCORPORATING THE IAMA FAST TRACK ARBITRATION RULES (2007), available at http://www.iama.org.au/pdf/IAMAAR_FastTrack07.pdf; NAI ARBITRATION RULES § 4A (2008) (addressing “Summary Arbitral Proceedings”).

108. INT’L INST. FOR CONFLICT PREVENTION & RESOL. GLOBAL RULES FOR EXPEDITED COMMERCIAL ARBITRATION (draft on file with author).

Procedures are aimed at cases in which “no disclosed . . . counterclaim exceeds \$75,000.”¹⁰⁹ The original JAMS Streamlined Arbitration Rules and Procedures, less procedurally spare than their AAA counterpart, were designed to govern arbitrations in which “no disputed claim or counterclaim exceeds \$250,000.”¹¹⁰

Of late, however, inventive attorneys have been contemplating broader applications for time-bounded arbitration. English QC and scholar John Uff opined that to avoid “the enormously wasteful and costly process of preparing volumes of documentation” associated with disputes under engineering and construction contracts, it would be appropriate to “channel” controversies into narrow issues capable of being precisely defined and resolved on the basis of limited materials.¹¹¹ Similar logic inspired CPR’s Expedited Construction Arbitration Procedures, which include no specific dollar limits.¹¹² JAMS also published expedited rules for construction disputes of general applicability.¹¹³ It is too early to tell whether these models, or Uff’s concept of “smaller claim packages, quickly adjudicated,” will be broadly embraced. While the concept is similar to the “dispute review board (DRB)” mechanisms widely used on major infrastructure projects, decisions by DRB panels are non-binding or only “preliminarily binding,”¹¹⁴ attorneys are likely to be far more wary of a short, sharp process that produces a fully binding decision—at least where the stakes are high.¹¹⁵

While many counselors will be hesitant to embrace expedited models as all-purpose arbitration rules, they may, of course, contractually limit their application to claims or disputes below a certain dollar fig-

109. See AAA COMMERCIAL RULES, *supra* note 35, at R. R-1(b).

110. See JAMS STREAMLINED RULES, *supra* note 105, at R. 1.

111. John Uff, *Are We All in the Wrong Job?: Reflections on Construction Dispute Resolution*, SOC’Y OF CONSTRUCTION L. PAPERS, July 2001, at 7.

112. See CPR EXPEDITED ARBITRATION, *supra* note 107.

113. See JAMS ENG’G/CONSTR. EXPEDITED RULES, *supra* note 106.

114. The CPR procedures specifically state that they were “propelled” by “[t]he United Kingdom’s speedier construction adjudication process.” CPR EXPEDITED ARBITRATION, *supra* note 107. This statutorily-mandated procedure for resolving payment disputes on construction projects in the UK has dramatically affected the landscape of construction dispute resolution. Importantly, however, adjudicated results are not permanently binding unless the parties fail later to arbitrate or adjudicate the dispute. See Stipanowich, *New Litigation*, *supra* note 1, at Part II.D.

115. In light of such concerns it should be noted that the drafters of the CPR procedures included a specific reference to the possibility of a “second look” in the form of CPR’s private Arbitration Appeal Procedure. See CPR EXPEDITED ARBITRATION, *supra* note 107. The JAMS Engineering/Construction Expedited Rules also make reference to the option of using that organization’s appeal procedure. See JAMS ENG’G/CONSTR. EXPEDITED RULES, *supra* note 106, R. 34. The subject of appellate arbitration is discussed below. See *infra* text accompanying notes 226-30.

ure or to specific categories. Claims or disputes not covered by the expedited or streamlined procedures could be addressed by “regular” arbitration rules. In such cases, a drafter using the CPR or JAMS models must produce a customized clause incorporating multiple sets of rules.

b. Time limits

All expedited or streamlined rules are distinguished by fixed or presumptive time limits, although these time limits vary considerably in detail. The AAA Expedited Procedures, aimed at small-dollar claims, contemplate the shortest cycle time, with an anticipated time horizon of around sixty days.¹¹⁶ CPR’s procedures embody a conceptual hundred-day time frame, including a maximum of sixty days to the hearing, thirty days for hearings, and ten days for deliberation and preparation of an award.¹¹⁷ (Importantly, the hundred-day period does not begin until the date set by the arbitrators at an initial pre-hearing conference; thus, it does not include critical early procedures governing the selection of arbitrators and detailed statements submitted by both parties.)¹¹⁸ JAMS’s models also include shortened procedural stages.¹¹⁹

An agreement to time limits, standing alone, is obviously insufficient; drafters must incorporate specific process elements facilitating a shorter arbitration. These elements include arbitrator selection procedures, early sharing of detailed information, tightly bounded discovery, and (possibly) limitations on the final award.

c. Number of arbitrators, appointment process

Using a single arbitrator instead of a panel is an obvious choice for those seeking economy and efficiency; it simplifies every stage of arbitration, from appointment to award-writing. Thus, some expedited procedures assume a single arbitrator will be appointed unless the parties agree otherwise.¹²⁰

116. The hearing is “to be scheduled to take place within 30 days of confirmation of the arbitrator’s appointment.” AAA COMMERCIAL RULES, *supra* note 35, at R. E-7. Awards are to be rendered within 14 days of the close of hearing. *Id.* at R. E-9. In the absence of a showing of good cause, the hearing itself is limited to a day. *Id.* at R. E-8(a). *Cf.* AAA CONSTR. RULES, *supra* note 102.

117. CPR EXPEDITED ARBITRATION, *supra* note 107, R. 1.3.

118. *See id.* at R. 3, 5, 9.3.

119. *See, e.g., infra* text accompanying note 164 (comparing rules).

120. *See, e.g.,* AAA COMMERCIAL RULES, *supra* note 35, at R. E-4; JAMS STREAMLINED RULES, *supra* note 105, at R. 12(a). *But see* CPR EXPEDITED ARBITRATION, *supra* note 107, at R. 5.1 (providing for three neutral arbitrators).

While employing a multi-member tribunal may make some lawyers more sanguine about streamlined arbitration of larger claims, it increases costs and the likelihood of delay. If drafters are truly serious about maintaining timelines, they should require each tribunal appointee to expressly represent to the parties that he or she has the time available to achieve an expedited timetable.¹²¹

d. Getting detailed information up front

One significant insight emerging from the development of streamlined rules is the critical importance of requiring parties to furnish detailed information regarding claims and defenses at the front end of the process. By way of illustration, the JAMS expedited construction model calls for claimants to file a

Submission of Claim . . . including a detailed statement of . . . claim including all material facts to be proved, the legal authority relied upon . . . , copies of all documents that Claimant intends to rely upon in the arbitration and names of all witnesses and experts Claimant intends to present at the Hearing.¹²²

Respondents are then required to prepare a Submission of Response of similar substance and form within twenty days of service of the Submission, and so forth.¹²³ These requirements represent a dramatic departure from the current norm in arbitration practice and demand significant adjustment in the expectations of advocates. However, these requirements are a critical element of any efficient process, as recognized by the new Final Report on Litigation Reform, which concludes that the failure to effectively identify issues early-on "often leads to a lack of focus in discovery."¹²⁴

Of course, the onus of these rules is likely to fall disproportionately on respondents since claimants will have the opportunity to make preparations in advance of making an initial demand. For this reason, current procedures emphasize arbitrator discretion to give respon-

121. See, e.g., CPR EXPEDITED ARBITRATION, *supra* note 107, R. 7.2. It makes sense to obtain such a commitment from a sole arbitrator as well.

122. JAMS ENG'G/CONSTR. EXPEDITED RULES, *supra* note 106, at R. 9. See also CPR EXPEDITED ARBITRATION, *supra* note 107, at R. 3.4 ("Statement of Claim" is to include a detailed statement of all facts to be proved, legal authorities relied upon, copies of all documents Claimant intends to rely on, and names, CV and summary opinion testimonies of expert witnesses Claimant intends to present.).

123. CPR EXPEDITED ARBITRATION, *supra* note 107, at R. 3.4.

124. FINAL REPORT ON LITIGATION REFORM, *supra* note 7, at 2. The Report calls for notice pleading to "be replaced by fact-based pleading . . . [that sets] forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses." *Id.* at 5.

dents reasonable time extensions.¹²⁵ Moreover, where arbitration is preceded by negotiation or mediation, both parties will be on notice that claims will likely be brought to arbitration.

In expedited processes, the pre-hearing conference assumes special significance as a tool for process planning and guidance.¹²⁶ Arbitrators may also find it necessary or appropriate to conduct frequent telephonic status meetings to ensure proper progress toward meeting deadlines.

e. Limiting discovery

Effective limitations on discovery are another critical element of any streamlined process. The most draconian approach is reflected in the absolute prohibition on discovery employed in the Abbott Labs procedures.¹²⁷ Most drafters would want to leave the door to discovery at least slightly ajar; thus, the AAA Construction Industry Fast-Track Rules aimed at smaller dollar claims, contemplate no discovery beyond exhibits to be used at the arbitration hearing “except . . . as ordered by the arbitrator in extraordinary cases when the demands of justice require it.”¹²⁸ Other rules tend to be less restrictive, relying primarily on admonitory language intended to guide parties and limit arbitral discretion. The JAMS Engineering & Construction Expedited Rules, for example, call for the “voluntary and informal” exchange of all relevant, non-privileged documents and other information, but admonish parties to limit requests to “material issues in dispute” and to make such requests “as narrow as reasonably possible.” Depositions are not permissible “except upon a showing of exceptional need” and with arbitrator approval. Electronic data may be furnished in the form most convenient for the producing party, and broad requests for email discovery are not permitted.¹²⁹ The subject of discovery is treated more extensively in Section II.C.

125. See, e.g., CPR EXPEDITED ARBITRATION, *supra* note 107, at R. 3.6 (permitting the Tribunal to extend the time for the Respondent to deliver its Statement of Defense); *id.* at R. 11(e) (permitting Arbitrator to extend deadlines).

126. See CPR EXPEDITED ARBITRATION, *supra* note 107, at R. 9. A pre-hearing conference held before the arbitration may be necessary to deal with difficult preliminary issues, such as specifying issues to be resolved or stipulating uncontested facts. Joseph L. Daly, *Arbitration: The Basics*, 5 J. OF AM. ARB. 1, 40 (2006); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 176-78.

127. See *supra* text accompanying note 89.

128. See AAA COMMERCIAL RULES, *supra* note 35, at R. F-7.

129. JAMS ENG'G/CONSTR. EXPEDITED RULES, *supra* note 106, at R. 17. Cf. CPR EXPEDITED ARBITRATION, *supra* note 107, at R. 11.

f. Limits on awards

Another method for facilitating streamlined arbitration is to limit the scope of arbitral discretion in award-making. The Abbott Labs procedure required arbitrators to choose “the proposed ruling and remedy of one of the parties on each disputed issue,” a creative “either/or” variant on traditional “baseball arbitration.”¹³⁰ Parties might also consider precluding arbitrators from granting certain kinds of remedies, such as punitive damages.¹³¹ Yet another possibility is the use of upper and lower limits on awards of monetary damages, although few parties would resort to this option except in the wake of negotiation.¹³²

3. Other considerations for more efficient arbitration

a. Provisions for dispositive motions

The use of dispositive motions in arbitration—now contemplated even by some expedited rules¹³³—is, practically speaking, a double-edged sword.¹³⁴ This import from the court system, prudently employed, is a potentially critical tool for narrowing arbitral issues prior to hearings and full-blown discovery, thus avoiding unnecessary preparation and hearing time. The problem is that, as in court, motion practice often contributes significantly to arbitration cost and cycle time without clear benefits. Filing of motions often leads to the establishment of schedules for briefing and arguments entailing considerable effort by advocates, only to have arbitrators postpone decisions on

130. See DRAFTER'S DESKBOOK, *supra* note 30, at 43; JAMS Arbitration Defined, available at <http://www.jamsadr.com/arbitration/defined.asp> (for additional discussion on either/or arbitration).

131. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 53-55, 272-73 (noting that an exclusion of punitive damages from arbitration does not necessarily amount to a waiver of the right to bring punitives in court); Charles Smith, *The Application of Due Process to Arbitration Awards of Punitive Damages – Where is the State Action?* 2007 J. DISP. RESOL. 417, 437 (2007).

132. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 53-55. There is also the possibility of tying limits on arbitral award-making authority to trial *de novo*, as illustrated by consumer dispute resolution programs under state lemon laws. See, e.g., WASH. REV. CODE § 19.118.100 (2009). It is doubtful, however, that business clients would see a benefit in preserving the option of court trial for the resolution of disputes involving commercial contracts. The subject of contractual provisions for judicial review of awards on the merits is addressed in a later section. See *infra* Part II.D.

133. See, e.g., JAMS ENG'G/CONSTR. EXPEDITED RULES, *supra* note 106, at R. 18.

134. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 203-06; Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 186 (2008). See also Albert G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, 62 DISP. RESOL. J. 17 (2007).

the motions until the close of hearings.¹³⁵ While arbitrators are properly chary of summarily disposing of matters implicating factual issues, certain matters (such as contractual limitations on damages, statutory remedies, or statutes of limitations and other legal limitations on causes of action) may be forthrightly addressed early on with little or no discovery.¹³⁶ If dispositive action is foreseen as a useful element in arbitration, an appropriate provision should be included in the arbitration procedure.¹³⁷

At the time of appointment, moreover, parties should assess whether potential arbitrators are temperamentally and philosophically capable of rendering dispositive awards. Indeed, some leading arbitrators insist that motions should be addressed directly and energetically, since a prompt telephonic discussion may avoid the need for extensive briefing.¹³⁸

b. Other elements

Recent guideposts for arbitrators and advocates suggest other ways of achieving economy and efficiency in arbitration.¹³⁹ These include the use of electronic document management and retrieval options;¹⁴⁰ employing witness statements in lieu of direct testimony;¹⁴¹ joint examination of expert witnesses;¹⁴² chess clocks;¹⁴³ and “virtual” hear-

135. For a discussion of deposition handling in arbitrations, see Romaine L. Gardner, *Depositions in Arbitration: Thinking the Unthinkable*, 1131 PRACTISING LAW INST. CORP. LAW & PRAC. COURSE HANDBOOK 379, 389-97 (1999).

136. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 48, 53-55. The new Final Report on Litigation Reform states that “parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution.” FINAL REPORT ON LITIGATION REFORM, *supra* note 7, at 22. It also calls for a “new summary procedure . . . by which parties can submit applications for [the] determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials.” *Id.* at 6.

137. See, e.g., JAMS RULES, *supra* note 35, at R. 18.

138. See Louis L. C. Chang, *Keeping Arbitration Easy, Efficient, Economical and User Friendly*, 61 DISP. RESOL. J. 15, 16 (2006).

139. *Id.* See also Claiborne, *supra* note 134. See generally THE COLLEGE OF COMMERCIAL ARBITRATORS: GUIDE TO THE BEST PRACTICES IN COMMERCIAL ARBITRATION (Curtis E. von Kann, ed.) (2006) [hereinafter CCA GUIDE TO BEST PRACTICES].

140. See William A. Tanenbaum, *Arbitration of Outsourcing, IP and Technology Disputes*, 914 PRACTISING LAW INST. PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROP. COURSE HANDBOOK SERIES 11 (2007) (discussing what to include in the arbitration clause when electronic documents are likely to be involved in a dispute).

141. See James J. Myers, *10 Techniques for Managing Arbitration Hearings*, 51 DISP. RESOL. J. 28 (1996); Ariana R. Levinson, *Lawyering Skills, Principles and Methods Offer Insight as to Best Practices for Arbitration*, 60 BAYLOR L. REV. 1 (2008).

142. See Terry F. Peppard, *New International Evidence Rules Advance Arbitration Process*, 73 WIS. LAWYER 18, 21 (2000) (“[joint examination] allows the arbitrators to make instant comparisons of contending views [and] encourages the witnesses to explain themselves to their collegial

ings.¹⁴⁴ If legally permissible, limited judicial review of arbitration awards may also be appropriate.¹⁴⁵

As discussed below, the best-drafted procedures may fail to produce desired results with arbitrators who are not good process managers.¹⁴⁶ Similarly, if an outside advocate is employed, the client (or in-house counsel) needs to be present at key decision points to ensure the client's goals are furthered.¹⁴⁷

C. *Make Clear Choices Regarding Discovery*

No aspect of modern commercial arbitration is more redolent of litigation than discovery practice, and no element of arbitration practice more neatly embodies the fundamental tension between economy and due process. Legal counselors should be aware, however, that the old "no discovery in arbitration" maxim is generally inaccurate and some amount of discovery usually takes place under standard arbitration rules. In the absence of agreement, considerable discretion may be reposed in arbitrators respecting discovery issues.¹⁴⁸ Given the costs and potential delays associated with discovery, counsel should consider specific procedural options during the drafting process.

In litigation, parties have broad rights to discover any evidence that may be reasonably calculated to lead to the discovery of admissible evidence regardless of the actual materiality or relevance of that evidence to the outcome of the case.¹⁴⁹ This approach, coupled with lack

peers and to make concessions of uncontested matters, thus . . . sharpen[ing] the issues to be decided.").

143. Chang, *supra* note 138, at 20.

144. For a discussion of the cost of face-to-face hearings in online arbitration, see Nicolas de Witt, *Online International Arbitration: Nine Issues Crucial to Its Success*, 12 AM. REV. OF INT'L ARB. 441, 456-58 (2001). See also ADR News, *AAA Establishes E-Commerce Panel, Forms E-Commerce Strategic Alliance*, 57 DISP. RESOL. J. 5 (2002) (electronic documents-only, telephonic and in-person arbitrations).

145. For a detailed, practical discussion of judicial review and arbitration, see notes and cases in COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 269-304.

146. *Id.*

147. See Kevin R. Casey & Marissa Parker, *Strategies for Achieving an Arbitration Advantage Require Early Analysis, Pre-Hearing Strategies, and Awards Scrutiny*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 167 (2008) (discussing steps advocates and clients can take to achieve client goals in arbitration).

148. For example, CPR Rule 11 provides:

The Tribunal may require and facilitate such disclosure as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective. The Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other information disclosed [in discovery].

CPR RULES, *supra* note 35, at R. 11.

149. The Federal Rules of Civil Procedure, for example, state:

of focus at the outset of discovery, mean that “discovery can cost far too much and can become an end in itself.”¹⁵⁰ Thus, the recent Final Report on Litigation Reform calls for dramatic overhauling of the court discovery process based on the “principle of proportionality.”¹⁵¹

Parties choosing to arbitrate presumably do so with the expectation of attenuated discovery. As observed in the Commentary to the CPR Rules,

Arbitration is not for the litigator who will ‘leave no stone unturned.’ Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items [for] which a party has a substantial, demonstrable need.¹⁵²

Yet such admonitions, relegated to commentary, may not be enough to persuade arbitrators to rigorously supervise and limit discovery. In cases of any size or complexity, cogent arguments may be framed in support of document discovery and for many depositions.¹⁵³ If documents are not exchanged and major witnesses are not deposed, parties will argue that it will be necessary to devote considerably more time to cross examination during the arbitration hearing. The danger of surprise should also be considered: if a witness’s testimony produces new information, there is a possibility that the hearing will have to be adjourned pending further investigation and information exchange.¹⁵⁴ Moreover, since arbitrators are subject to vacatur for refusal to admit relevant and material evidence,¹⁵⁵ some may draw the inference—not established by law—that a failure to grant court-like discovery is an inherent ground for vacatur.¹⁵⁶ While parties (including those who regard depositions as wholly inimical to the arbitration process and therefore inappropriate absent specific agreement)¹⁵⁷ may draw firm

Parties may obtain discovery regarding any nonprivileged matter that is relevant to [the claim or defense of any party] relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1). See Stipanowich, *New Litigation*, *supra* note 1, at Part I.B.

150. FINAL REPORT ON LITIGATION REFORM, *supra* note 7, at 2.

151. *Id.* at 7-16.

152. CPR RULES, *supra* note 35, at R. 11 cmt., available at <http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx#Commentary>.

153. Stipanowich, *New Litigation*, *supra* note 1, at Part I.B.2.a.

154. Stipanowich, *Rethinking*, *supra* note 95, at 444.

155. 9 U.S.C. § 10(a) (2000).

156. Letter from Curtis E. von Kann, Co-Chair, College of Commercial Arbitrators Summit on the Future of Arbitration (Oct. 2008) (on file with author).

157. See, e.g., Email from Joseph T. McLaughlin, Arbitrator and Former Partner, Heller Ehrman LLP (June 18, 2008) (on file with author); Revised Draft CPR Guidelines (June 19, 2008) (on file with author) (“Depositions are an integral part of the litigation process in the United States which the parties who have chosen arbitration have rejected.”).

lines, the response will vary with the arbitrator. Arbitrators may be especially reluctant to draw lines in the face of a broad litigation-style discovery plan embraced by counsel for both parties.¹⁵⁸ Because arbitration is ultimately a consensual process, even arbitrators who suspect that business parties would have preferred a more attenuated process will tend to bow to a mutual agreement of the parties' counsel in the absence of (1) clear guidance regarding the parties' intent to circumscribe discovery, and (2) clear arbitral authority to modify the agreement of counsel regarding discovery.¹⁵⁹

Parties desiring different or more explicit guidelines for information exchange and discovery in arbitration, including those who are concerned about the impact of discovery on the cost and duration of arbitration, now have a variety of templates to consider.

1. Making discrete choices

As discussed above in connection with expedited hearings, sponsors of leading arbitration procedures have begun to incorporate specific provisions setting clear limits on discovery or establishing standards to guide arbitral discretion in addressing discovery disputes.¹⁶⁰ Other general guidelines on discovery are also emerging.

The CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration is an effort to offer counselors and drafters clear choices regarding information exchange and discovery.¹⁶¹ It gives parties the opportunity to select among several alternative standards regarding pre-hearing exchange of documents and witness information. Counsel for parties to domestic commercial arbitration agreements may also wish to consult and consider incorporating elements of other standards, including the IBA Rules on the

158. The CPR Commentary encourages parties' counsel "to agree, preferably before the initial pre-hearing conference, on a discovery plan and schedule and to submit the same to the Tribunal for its approval." CPR RULES, *supra* note 35, at R. 11 cmt.

159. Where there are concerns that parties may be ill-served by a discovery plan, an arbitration tribunal might require principals or house counsel to participate in the preliminary hearing(s) at which the discovery plan is discussed, and to sign-off on the discovery plan. The author is aware of this practice by some arbitrators.

160. *See supra* text accompanying notes 127-29.

161. *See* INT'L INST. FOR CONFLICT PREVENTION & RESOL. CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION, *Preamble* (2008), available at <http://www.cpradr.org/ClausesRules/CPRProtocolonDisclosure/tabid/393/Default.aspx> [hereinafter CPR PROTOCOL] (designed in part "to afford to parties to an arbitration agreement the opportunity to adopt certain modes of dealing with pre-hearing disclosures of documents and with the presentation of witnesses, pursuant to Schedules.").

Taking of Evidence in International Commercial Arbitration¹⁶² or the ICDR Guidelines for Arbitrators Concerning Exchanges of Information.¹⁶³ Both standards were designed for proceedings involving parties and practitioners from civil law countries and sovereign states applying common law.

In addition, emerging standards may enhance the ability of arbitrators to effectively address information exchange issues by encouraging the explicit weighing of burdens and benefits. Emerging standards may also offer arbitrators other tools, including explicit authority to condition production on the payment by the requesting party of associated reasonable costs.¹⁶⁴ These templates may be employed in various ways.

2. Document exchange and discovery

Standard procedures often provide for some exchange of documents, at least to the extent they are non-privileged and relevant to the dispute.¹⁶⁵ In some cases, such production occurs within a fairly short timeframe.¹⁶⁶ Some parties, however, may want to narrow (or expand) this framework or establish more specific standards for document exchange.

A straightforward template for limited information exchange/discovery is found in the leading international standard on the subject, the IBA Rules on the Taking of Evidence in International Commercial Arbitration.¹⁶⁷ This standard, a compromise in which U.S.-style

162. See INT'L BAR ASS'N IBA RULES ON THE TAKING OF EVIDENCE IN INT'L COMMERCIAL ARBITRATION (1999), available at <http://www.ibanet.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf> [hereinafter IBA RULES].

163. See INT'L CTR. FOR DISPUTE RESOL. ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFO. (2008), available at <http://www.adr.org/si.asp?id=5288> [hereinafter ICDR GUIDELINES].

164. See, e.g., CPR PROTOCOL, *supra* note 161, § 1(e)(2). See also ICDR GUIDELINES, *supra* note 163, at R. 8.a., which provides:

In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.

165. See, e.g., JAMS RULES, *supra* note 35, at R. 17(a) (providing for the parties to "cooperate in . . . the voluntary and informal exchange of all . . . relevant, non-privileged documents, including, but without limitation, copies of all documents in their possession or control on which they rely in support of their positions.").

166. The JAMS Comprehensive Rules call for document exchange "within twenty-one (21) calendar days after all pleadings or notice of claims have been received." JAMS RULES, *supra* note 35, at R. 17(a). Under the JAMS Streamlined Arbitration Rules, this period is reduced to 14 days. JAMS STREAMLINED RULES, *supra* note 105, at R. 13(a).

167. See IBA Rules, *supra* note 162.

discovery is tempered by the influence of prevailing practices in civil law countries, initially requires each party only to submit "all documents available to it on which it relies."¹⁶⁸ It also establishes a procedure for arbitral resolution of disputes over further document production that requires parties to describe requested documents with specificity, explain their relevance and materiality, assure the tribunal that they do not have the documents, and make clear why they believe the other party has possession or control of the documents.¹⁶⁹

A further step toward variegation is the recent publication of the CPR Protocol on Disclosure,¹⁷⁰ which offers parties a choice of four discrete "modes" for document disclosure. These include: (Mode A) No disclosure save for documents to be presented at the hearing; (Mode B) Disclosure as provided for in Mode A together with "[p]re-hearing production only of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need;" (Mode C) Disclosure provided for in Mode B together with disclosure, prior to the hearing, "of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure;" and (Mode D) Pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication, and undue burden.¹⁷¹ Although the CPR Protocol is admirable in intent, it is not an exhaustive list of creative

168. *Id.* at art. 3, § 1.

169. The IBA Rules call for Requests to Produce to contain

- (a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
- (b) a description of how the documents requested are relevant and material to the outcome of the case; and
- (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

Id. at art. 3, § 5.

The IBA Rules appear to have influenced the recent ICDR Guidelines for Arbitrators Concerning Exchanges of Information, which empower the arbitrators, "upon application, [to] require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Request for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case."

ICDR GUIDELINES, *supra* note 163, at guideline 3(a).

170. CPR PROTOCOL, *supra* note 161, § 1. *Cf.* Lawrence W. Newman & David Zaslowky, *Predictability in International Arbitration*, 100 N.Y. L. J. 3 (2004).

171. CPR PROTOCOL, *supra* note 161, at sched. 1.

approaches to discovery in arbitration. For example, some arbitrators limit each party to a certain number of document requests, including subparts.¹⁷²

3. Limits on depositions

In the interest of economy or certainty, some parties may want to provide that no depositions, or a limited number of depositions, will be conducted in anticipation of arbitration.¹⁷³ Such limitations may be tempered by giving arbitrators discretion to allow depositions in exceptional circumstances where justice requires.¹⁷⁴ A useful example of a clear limit coupled with narrowly cabined arbitrator discretion is contained in Rule 17 of the JAMS Comprehensive Arbitration Rules, which permits each party to take a single deposition;

[t]he necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.¹⁷⁵

Another proposed response to the burgeoning discovery problem is the adoption of the international arbitration practice of substituting detailed sworn witness statements for direct examination.¹⁷⁶ Such statements, provided to all participants prior to the hearing, might provide a rough surrogate for depositions and save hearing time. Adjustments to the international practice, such as abbreviated direct examination, may be necessary to provide comfort to American lawyers and arbitrators. The new draft CPR Protocol on Disclosure offers parties the choice of embracing such an approach in their arbitration agreement, possibly in lieu of depositions.¹⁷⁷

4. Giving arbitrators the “last word”

An issue related to limitations on depositions is the primacy of the arbitrator’s authority respecting pre-hearing disclosure. Specifically,

172. See, e.g., Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, Comment, 34 HOUS. L. REV. 199, 224-27 (1997).

173. The ICDR Guidelines note that “[d]epositions, . . . as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.” ICDR GUIDELINES, *supra* note 163, at guideline 6.b. A variant of this approach used by some arbitrators is to provide each party with a maximum number of hours of depositions of persons within the other party’s employ or control.

174. See *supra* note 129 (discussing discretionary authority of arbitrator under JAMS Engineering/Construction Expedited Rules).

175. JAMS RULES, *supra* note 35, at R. 17(b).

176. The witness statement concept is embodied in the IBA Rules. IBA RULES, *supra* note 162, art. 4, §§ 4-9.

177. CPR PROTOCOL, *supra* note 161, §§ 2-3, 5, 8-9.

parties should consider whether they wish arbitrators or counsel to have the last word on limiting the scope of discovery. In this respect, current standards vary. The AAA Rules for Large, Complex Cases apparently authorize the arbitrator(s) to police party agreements and “place such limitations on the conduct of such [agreed] discovery as the arbitrator(s) shall deem appropriate.”¹⁷⁸ Although both the JAMS and CPR Rules give arbitrators considerable authority regarding exchange of information, neither set of procedures is explicit regarding the authority of arbitrators to “trump” or modify agreements regarding discovery.¹⁷⁹

5. E-discovery

As one leading participant in the development of guidelines for the management and discovery of electronic information explains,

If the law of e-discovery were allowed to develop on an ad hoc basis, one decision at a time, companies with their complex information technology systems would be eaten alive by process costs. It is essential to develop best practices that work in a real world.¹⁸⁰

178. AAA COMMERCIAL RULES, *supra* note 35, at R. L-4(c). An even stronger statement of the “final authority” of arbitrators regarding discovery is set forth in the ICDR Guidelines:

- 1.a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party’s opportunity to present its claims and defenses fairly.
- b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, *but the tribunal retains final authority to apply the above standard*. To the extent the Parties wish to depart from this standard, they may do so only on the basis of an express agreement in writing and in consultation with the tribunal.

ICDR GUIDELINES, *supra* note 163, at guideline 1.a-b (emphasis added).

179. The JAMS Comprehensive Rules grant each party one deposition as of right, and call for “the necessity of additional depositions . . . [to] be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.” JAMS RULES, *supra* note 35, at R. 17(b). The JAMS Comprehensive Rules do not give any indication about what happens when the parties have agreed to multiple depositions.

While empowering the Tribunal to “require and facilitate such discovery as it shall determine is appropriate” taking into account parties’ needs, expeditiousness and cost-effectiveness, the CPR Rules also do not address the impact of mutual agreement on discovery issues by the parties. CPR RULES, *supra* note 35, at R. 11. However, the CPR Protocol on Disclosure appears to anticipate that “[w]here the parties have agreed on discovery depositions, the Tribunal should exercise its authority to scrutinize and regulated the process . . . [and possibly impose] strict limits on the length and number of depositions consistent with the demonstrated needs of the parties.” CPR PROTOCOL, *supra* note 161, § 5.

180. The Sedona Conference, *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (The Sedona Conference Working Group Series, Sept. 2005).

The challenge for arbitrators and arbitration processes is addressing these concerns effectively in the context of a highly discretionary system (without uniform rules or precedents) that is conventionally aimed at efficiency and expediency in conflict resolution.¹⁸¹ Issues include the scope or limits of e-discovery and its corresponding burdens and benefits;¹⁸² handling of the costs of retrieval;¹⁸³ and the duty to preserve electronic information, spoliation issues, and related sanctions.¹⁸⁴ Will it be possible for arbitrators to effectively meet the challenges of e-discovery in an efficient and relatively economical manner? The answer depends on the effectiveness of choices made by counselors and drafters.

Concerns regarding the relative burdens associated with e-discovery may lead parties to consider adopting language similar to that contained in the ICDR Guidelines, which permit a party to make documents maintained in electronic form “available in the form . . . most convenient and economical for it, unless the Tribunal determines, on application . . . that there is a compelling need for access to the documents in a different form.”¹⁸⁵ Moreover, requests for such documents “should be narrowly focused and structured to make searching for them as economical as possible.” The Guidelines conclude by permitting arbitrators to “direct testing or other means of focusing and limiting any search.”¹⁸⁶ The use of “test batch production” is emerging as a critical way of identifying areas that require special attention in advance of major production.

Parties may avoid many of the costs—if not all the risks—of the revelation of privileged material in electronic data by agreeing to have

181. See Irene C. Warshauer, *Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence*, 61 DISP. RESOL. J. 9, 10 (2006-07); Jennifer E. Lacroix, *Practical Guidelines for Managing e-Discovery Without Breaking the Bank*, 2 PLI PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROP. COURSE HANDBOOK SERIES 645-65 (2008); Theodore C. Hirt, *The Two-Tier Discovery Provision of Rule 26(B)(2)(B) – A Reasonable Measure for Controlling Electronic Discovery?* 13 RICH. J. L. & TECH. 12 (2007); Thomas Y. Allman, *The “Two-Tiered” Approach to E-Discovery: Has Rule 26(B)(2)(B) Fulfilled its Promise?* 14 RICH. J. L. & TECH. 7 (2008).

182. See generally Sedona Conference, *supra* note 180.

183. For a discussion of these and other issues, see John B. Tieder, *Electronic Discovery and its Implications for International Arbitration* (2007) in 29 THE COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS (Dennis Campbell ed., Kluwer Law International, 2007).

Jessica L. Repa, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test is Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, Comment, 54 AM. U. L. REV. 257 (2004); Warshauer, *supra* note 180, at 11 (discussing the development of “claw-back” agreements, which permit a party to produce all of its relevant documents for review without waiving privilege).

184. Warshauer, *supra* note 181, at 12-15.

185. ICDR GUIDELINES, *supra* note 163, § 4.

186. ICDR GUIDELINES, *supra* note 163, § 4.

the arbitrators issue a pre-arbitral order relieving the parties of the obligation to conduct a pre-production review of all electronic documents for privilege, and ordering that attorney-client and work product privileges are not waived by production of documents that have not been thus reviewed.¹⁸⁷ Parties may also wish to consider identifying likely informational needs and agreeing on what information needs to be preserved, in what format, and for how long.¹⁸⁸

A prototypical, multi-faceted template addressing various aspects of pre-hearing disclosure of electronic information is contained in the CPR Protocol on Disclosure.¹⁸⁹ The Protocol presents parties with four discrete alternatives regarding pre-hearing disclosure of electronic documents. The alternatives range from no pre-hearing disclosure, except with respect to copies of printouts of electronic documents to be presented in the hearing, to full disclosures "as required/permitted under the Federal Rules of Civil Procedure." The intermediate options permit parties to limit production to documents maintained by a specific number of designated custodians, to limit the time period for which documents will be produced, to identify the sources (such as primary storage, back-up servers, back-up tapes, cell phones, and voicemails) from which production will be made, and to determine whether information may be obtained by forensic means.¹⁹⁰

6. Other considerations

Depending on the circumstances, parties may consider it appropriate to include other provisions, such as a term giving arbitrators ex-

187. Warshauer, *supra* note 181, at 11.

188. See Sedona Conference, *supra* note 180, at 11-20, 31-43; William B. Dodero & Thomas J. Smith, *Creating a Strong Foundation for Your Company's Records Management Practices*, 25 ACC DOCKET 52 (2007).

189. See Newman & Zaslowky, *supra* note 170.

190. See CPR PROTOCOL, *supra* note 161, at sched. 2, modes B, C. The Protocol also offers a set of General Principles which may be adopted by themselves or in tandem with a particular "mode" for pre-hearing disclosure of electronic documents. It provides:

In making rulings on pre-hearing disclosure, the tribunal should bear in mind the high cost and burdens associated with compliance with requests for the production of electronic information. It is frequently recognized that e-mail and other electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests. Production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should be granted only upon a showing of extraordinary need. Requests for back-up tapes, or fragmented or deleted files should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's document-retention policies operated in good faith.

Id. § 4(a).

licit authority to weigh the burdens and benefits of a discovery request, or the ability to condition disclosure on the requesting party paying reasonable costs of production.¹⁹¹ It may serve efficiency to appoint the chair of the tribunal to serve as discovery master; in cases in which confidentiality of sensitive information is a primary concern, a provision for the use of a special master to supervise certain aspects of discovery may be adopted.¹⁹²

Drafters should also be aware that discovery relating to third parties may be problematic for parties operating under the aegis of the Federal Arbitration Act.¹⁹³ However, some state laws are more amenable to judicial enforcement of third party subpoenas.¹⁹⁴ If its application is otherwise acceptable, parties may wish to consider a choice of law provision referencing state law for the purpose of the arbitration agreement.

Finally, it should be kept in mind that although arbitration hearings are relatively private, neither standard procedures nor applicable laws provide a cloak of confidentiality for arbitration-related communications or events.¹⁹⁵ While arbitrators and arbitral institutions have obligations to preserve the privacy of the process under applicable procedural rules¹⁹⁶ and ethical standards,¹⁹⁷ and public policies pro-

191. See CPR PROTOCOL, *supra* note 161, § 1(e)(2).

192. See JAMS RULES, *supra* note 35, at R. 17(b).

193. Compare *Security Life Ins. Co. of America v. Duncanson & Holt*, 228 F.3d 865, 872 (8th Cir. 2000) (allowing arbitrators to issue pre-hearing document subpoenas to third parties); with *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004) (not allowing arbitrators to issue pre-hearing subpoenas, but finding that arbitrators could subpoena non-parties to appear before them for a pre-merit hearing and bring the documents with them) and *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005) (following *Hay Group*) cited in *Leslie Trager, The Use of Subpoenas in Arbitration*, 62 DISP. RESOL. J. 14 (2007-08).

194. See, e.g., REVISED UNIF. ARB. ACT § 17(b) (2000), available at <http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm>.

195. See generally *COMMERCIAL ARBITRATION AT ITS BEST*, *supra* note 21, at ch. 6. See also Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 129-31 (2003).

196. For example, the AAA Commercial Rules say, "The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary." AAA COMMERCIAL RULES, *supra* note 35, at R. R-23. A more expansive, detailed provision is found in the JAMS Comprehensive Rules:

JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

JAMS RULES, *supra* note 35, at R. 26(a).

197. See, e.g., THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2005), available at <http://cpr-prod.ibelongsnetworks.com/ClausesRules/ArbitrationEthics/tabid/80/Default.aspx>; CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR, PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS (2002), available at <http://www.>

tect arbitrators from having to testify,¹⁹⁸ parties must contract for confidentiality if they want to ensure the arbitration remains confidential.¹⁹⁹

Absent a specific agreement, parties and their agents have no obligation to preserve the confidentiality of exchanged documents or arbitration-related communications or events. In fact, the latter may be disclosed to third parties (including the media), and could be the subject of third-party discovery in a collateral lawsuit.²⁰⁰ Therefore, parties seeking to protect sensitive or proprietary information usually request the arbitrators to issue appropriate protective orders or, if mutually acceptable, enter into a post-dispute confidentiality agreement.²⁰¹ In transactions involving key intellectual property or other sensitive proprietary information, however, the best course is to take

cpradr.org/Portals/0/finalProvider.pdf; CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR, PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT FOR THE LAWYER AS THIRD PARTY NEUTRAL (2002), available at <http://www.cpradr.org/Portals/0/CPRGeorge-ModelRule.pdf>.

198. See Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449 (2004); See Dennis R. Nolan & Roger I. Abrams, *Arbitral Immunity*, 11 Indus. Rel. L.J. 228 (1989).

199. Schmitz, *supra* note 57, at 1218-19.

200. See, e.g., Lawrence E. Jaffe Pension Plan v. Household Int'l Inc., No. 04-N-1228, 2004 U.S. Dist. LEXIS 16174 (D. Colo. Aug. 12, 2004) (permitting third party discovery because there was no showing that production would result in unduly harmful disclosures); Industrotech Constructors, Inc. v. Duke Univ., 314 S.E.2d 272 (N.C. Ct. App. 1984) (permitting third party discovery of transcripts of arbitration proceeding). See also COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 253, 255; but see Group Health Plan Inc. v. BJC Healthcare Systems, Inc., 30 S.W.3d 198 (Mo. Ct. App. 2000) (finding it was improper for an arbitrator to require a nonparty to an arbitration to turn over confidential documents from an earlier arbitration).

One set of standard rules that attempts to place non-disclosure obligations on parties is the CPR Arbitration rules, which provide:

Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect the legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal.

CPR RULES, *supra* note 35, at R. 18. However, parties truly concerned about disclosure of trade secrets or other sensitive information will want to consider more specific provisions. See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 254-63.

201. The JAMS Comprehensive Rules provide, "The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information." JAMS RULES, *supra* note 35, at R. 26(b). The AAA Commercial Arbitration Rules empower arbitrators to "take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property." AAA COMMERCIAL RULES, *supra* note 35, at R. R-34(a). The CPR Rules provide that "[t]he Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery." CPR RULES, *supra* note 35, at R. 11.

specific affirmative steps to ensure confidentiality in arbitration as a part of initial contract planning.²⁰²

D. *Avoid Unnecessary Judicial Intrusion*

1. Increased cost and cycle time through questionable choice-making: agreements to expand judicial review

Although increased costs and delays are often a result of business users' failures to plan for arbitration by making appropriate process choices, contract planners may only exacerbate these problems if they make the wrong choices. A classic example of the latter is a contractual provision providing for judicial review and vacatur of arbitration awards for errors of law or fact.²⁰³

Consistent with the understanding that arbitration offered businesses the opportunity to avoid the "needless contention that [is] incidental to the atmosphere of trials in court,"²⁰⁴ Congress in the Federal Arbitration Act produced a spare legal framework for the judicial enforcement of arbitration agreements and awards.²⁰⁵ A keystone of this structure is the rigorously restrained template for judicial confirmation, modification, or vacatur of arbitration awards.²⁰⁶ This template includes a narrow statutory imprimatur for vacating awards, limited in essence to situations where due process was not accorded or where arbitrators clearly acted in excess of their contractually-defined authority.²⁰⁷ These strictures imbue arbitration awards with a meaningful—or, depending on one's point of view, an awful—finality. The fear of being saddled with a truly bad award gives some business lawyers pause—especially when the potential business consequences are dire. In recent years, this fear of finality has led to the emergence of a species of arbitration agreements calling for more searching judicial scru-

202. See, e.g., INT'L INST. FOR CONFLICT PREVENTION & RESOL CPR RULES FOR NON-ADMINISTERED ARBITRATION OF PATENT AND TRADE SECRET DISPUTES R. 17 (2005), available at <http://www.cpradr.org/ClausesRules/PatentRules/tabid/303/Default.aspx>; COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 259-63 (offering templates including CPR Model Arbitration Confidentiality Agreement and CPR Model Non-Party Confidentiality Agreement).

203. See Stipanowich, *New Litigation*, *supra* note 1, at Part I.A.4.

204. Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 614 n.44 (1928).

205. See Stipanowich, *Arbitration Penumbra*, *supra* note 49, at 430-34.

206. See Schmitz, *Mud Bowl*, *supra* note 55, 189-90.

207. See 9 U.S.C. § 10 (West Supp. 1994). See Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. W. L. REV. 443 (1998); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Arbitration Awards*, 30 GA. L. REV. 731 (1996).

tiny of awards, including review of awards for errors of law or fact.²⁰⁸ Conceptually, one supposes the result would be a hybrid in which the benefits of private arbitration would be coupled with the checks and balances of the civil appellate process. But the sword is double-edged, and the pitfalls for unwary drafters multiple.

While recent emphasis is on the legalities of contractually expanded judicial review,²⁰⁹ considerably less attention has been given a more fundamental question—namely, do contract planners do their clients a favor by including such provisions in commercial arbitration agreements? The one gathering of experts that directly addressed the issue, the CPR Commission on the Future of Arbitration, an aggregation of leading arbitrators and attorneys specializing in arbitration, responded with a resounding “No!”²¹⁰ They viewed such provisions as undermining key conventional benefits of arbitration, including finality, efficiency, economy, and expert decision making.²¹¹ Such provisions would, they believed, increase costs and delay the ultimate resolution of conflict without commensurate countervailing benefits.²¹² Moreover, such provisions pose particular challenges for drafters, both from the standpoint of creating practical, workable standards for review and addressing all of the pre- and post-award procedures required to implement enhanced review.²¹³ This includes: dollar or subject matter limits on review; the creation of an adequate record; the making of a

208. See Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 183-84 (2003); Dan C. Hulea, *Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 BROOK. J. INT'L L. 313, 351 (2003); Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 430-31 (2004); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 230-31 (1997); but see Schmitz, *Mud Bowl*, *supra* note 55, 189-90; Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 150 (1997).

209. See Schmitz, *Mud Bowl*, *supra* note 55, 150.

210. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 291 (summarizing conclusions of CPR Commission).

211. *Id.*

212. Such provisions were also deemed likely to discourage arbitrators from considering “creative solutions” that might be questioned by a court. *Id.* at 288-89. Cf. *David Company v. Jim Miller Constr., Inc.*, 444 N.W.2d 836 (Minn. 1989). However, one would assume that rational drafters would only use such provisions in circumstances where a client places a premium on court-like due process and strict application of the law – in other words, in circumstances where arbitrators should eschew creativity in favor of doing what a court would do. Moreover, in the author’s experience commercial arbitration panels—especially those with lawyer members—tend to be highly sensitive to and guided by legal standards and rarely seek “creative” solutions.

213. See, e.g., Ronald J. Offenkrantz, *Negotiating and Drafting the Agreement to Arbitrate in 2003: Insuring against a Failure of Professional Responsibility*, 8 HARV. NEG. L. REV. 271, 278 (2003); Kevin A. Sullivan, Comment, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509, 548-59 (2002). See also COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 297.

sufficiently specific award, with an accompanying statement of rationale and findings of fact or conclusions of law; notice requirements; the possibility of remand to the original arbitrator(s); and the handling of related costs.²¹⁴

The extreme downside of contracting for expanded review in an atmosphere of uncertainty regarding the legal propriety and enforceability of such provisions was famously exemplified by the nine-year battle between LaPine Technology Corporation and Kyocera, over a 1994 award in an International Chamber of Commerce (ICC) arbitration proceeding, a parade of horrors punctuated by two decisions of the Ninth Circuit. In *LaPine Technology Corp. v. Kyocera*,²¹⁵ the court concluded that it was obliged to honor the parties' agreement that any arbitration award would be subject to judicial review for errors of fact or law since controlling Supreme Court precedents made "it clear that the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate, in accordance with the agreement's terms."²¹⁶ After six more years of legal maneuvering before the district court and the original arbitration panel, the Ninth Circuit reconsidered its original decision *en banc*, and reversed itself, declaring that enforcing expanded review provisions (such as those before it) would "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."²¹⁷

Compounding the drafter's dilemma is the fact that such provisions have not been uniformly embraced by federal and state courts. The federal circuits split regarding whether expansion of the FAA grounds for judicial review was permissible.²¹⁸ State court decisions also reflect a divergence of authority.²¹⁹

214. *Id.*

215. 130 F.3d 884 (9th Cir. 1997) (attorneys were able to provide for expanded judicial review in the arbitration clause that they drafted), *overruled by* *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (2003).

216. *Kyocera*, 130 F.3d at 888.

217. *Id.* at 998.

218. Five circuit courts came down in favor of enforcement. *See* *Puerto Rico Tele. Co., Inc. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 30-31 (1st Cir. 2005); *Rodway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001); *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997); *Gateway Technologies, Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995); *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 710-12 (6th Cir. 2005). Four circuits reached a contrary conclusion. *See* *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991); *UHC Management Co., Inc. v. Computer Scis. Corp.*, 148 F.3d 992, 997-98 (8th Cir. 1998); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003), *overruling* *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935-37 (10th Cir. 2001).

219. Decisions favoring enforcement include *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Cal. Ct. App. 2008); *NAB Constr. Corp. v. Metropolitan Transp. Auth.*, 579 N.Y.S.2d

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,²²⁰ the U.S. Supreme Court held that the Federal Arbitration Act (FAA) does not permit parties to expand the scope of judicial review of arbitration awards by agreement. In Justice Souter's written opinion, which was joined by five other justices, he declared that the grounds for judicial review of arbitration awards set forth in §§ 10–11 of the FAA are the exclusive sources of judicial review under that statute.²²¹ Moreover, the FAA's provisions for confirmation (vacatur and modification) should be viewed as "substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."²²²

Having strained mightily to nail down the coffin-lid on contractually expanded review under the FAA, the Court affirmatively invited consideration of other avenues to the same ends,²²³ such as where parties "contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable."²²⁴ Although the

375, 375 (N.Y. App. Div. 1992) (enforcing contractual provision permitting judicial review of an arbitration award "limited to the question of whether or not the [designated decision maker under an alternative dispute resolution procedure] is arbitrary, capricious or so grossly erroneous as to evidence bad faith."). Other state courts have found no room under arbitration statutes for expanded review. *Dick v. Dick*, 534 N.W.2d 185, 191 (Mich. Ct. App. 1994) (contractual option provision permitting appeal to the courts of "substantive issues" relating to the award attempted to create "a hybrid form of arbitration" that "[did] not comport with the requirements of the [Michigan] arbitration statute."); *Chi. Southshore & South Bend Railroad v. Northern Ind. Commuter Transp. Dist.*, 682 N.E.2d 156, 159 (Ill. App. 3d 1997), *rev'd*, 184 Ill. 151 (1998) (denying effect to term permitting a party claiming that arbitrator's award was based upon an error of law "to initiate an action at law . . . to determine such legal issue"; concluding that "[t]he subject matter jurisdiction of the trial court to review an arbitration award is limited and circumscribed by statute.").

New Jersey has addressed the issue by statute, providing for parties to arbitration agreements to "opt in" to a heightened standard of review established by the statute. New Jersey Alternative Dispute Resolution Act, N.J. STAT. ANN. 2A §§ 23A-12 (1999). The drafters of the Revised Uniform Arbitration Act (RUAA) considered and rejected such an approach, declining to establish any explicit basis for expanded review under that uniform act. *See REVISED UNIF. ARB. ACT* § 23 cmt. B (2000).

220. 128 S. Ct. 1396, 1404-05 (2008).

221. *Id.* at 1403.

222. "Any other reading [would open] the door to full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.'" *Id.* (quoting *Kyocera*, 341 F.3d at 998).

223. In a highly unusual move, the Court had requested additional briefing on these issues after the initial arguments; its March decision concluded that the supplemental arguments raised new points which required a remand for the development of the issues. The Ninth Circuit subsequently issued a remand order to the district court, concluding that the High Court decision "preserved the issue of sources of authority, other than the Federal Arbitration Act, through which a court may enforce an arbitration award." *Hall Street Assocs. LLC v. Mattel Inc.*, 531 F.3d 1019 (9th Cir. 2008).

224. *Mattel*, 128 S. Ct. at 1406.

full import of this invitation is yet to be clarified, state statutes or controlling judicial decisions promoting contractually expanded review will likely become “safe harbors” for such activity. New Jersey is perhaps the sole example of a statutory template for parties that wish to “opt in” to the legislative framework for elevated scrutiny of awards.²²⁵ In *Cable Connection, Inc. v. DIRECTV, Inc.*,²²⁶ California’s highest court recognized a more general “safe harbor” for contractually expanded judicial review under that state’s arbitration law.

The foregoing survey of the complex legal landscape surrounding contractually expanded judicial review illustrates the uncertainties confronting those seeking to include such provisions in their arbitration agreements.²²⁷ In some types of cases, contract planners may conclude that the difficulty of securing judicial oversight of arbitration awards requires them to forego arbitration entirely.

2. Alternatives to expanded judicial review; appellate arbitration processes

However, there are other less radical alternatives to expanded judicial review. These include identifying arbitrators who are likely to deliver an authoritative and rational decision, requiring the arbitrators to produce a detailed rationale for their awards, and placing limits on awards of monetary damages (including upper and lower limits for the award, a baseball arbitration format requiring arbitrators to make a choice between two alternative monetary awards, and a prohibition on certain kinds of relief, such as punitive damages).²²⁸ For those seeking a close analogue to judicial review, however, an appellate arbitration procedure may be the most suitable alternative.

Appellate arbitration procedures afford parties the opportunity of a “second look” at an arbitration award in a controlled setting while

225. See *supra* note 218.

226. 190 P.3d at 586.

227. In addition to addressing the impact of federal and state law respecting the enforceability of provisions for expanded review, parties should pay close attention to scope and procedural issues. If provisions of this kind are ever to provide benefit, it is probably in high-dollar or “bet-the-company” disputes. Usually, the focus will be on addressing errors of law where legal issues play a prominent part in the dispute. Drafters are well advised to choose very carefully among standards for judicial review for legal error. A separate determination should be made regarding the need for judicial review of findings of fact. Consideration should also be given to all of the other pre- and post-award procedures required to implement enhanced review, including the nature of the record of arbitration proceedings, the format of the award, notice requirements, the possibility of remand to the original arbitrator(s) or the empanelling of new arbitrators, and the handling of costs (including possible cost-shifting). See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 291-304.

228. See *id.* at 277-81.

avoiding the delays and legal uncertainties associated with expanded judicial review. Since properly constituted agreements for “second-tier” arbitration are as enforceable as any other arbitration agreements, so are the resulting awards.²²⁹ Appellate arbitration procedures have been utilized in a variety of commercial contexts, and at least two major institutions,²³⁰ the International Institute for Conflict Prevention & Resolution and JAMS, have published appellate arbitration rules for utilization in commercial cases.²³¹

Crafting an appropriate arbitral appeal process involves the consideration of numerous procedural issues, including the qualifications of the appellate panel and method of its selection; scope limits on appealable disputes; filing requirements; administrative fees; time limits on filing and appellate procedures; applicable standards of review; the type of record that will be maintained of the original arbitration hearing and transmitted to the appellate panel; the format of the original arbitration award; the form of argument on appeal (written, oral, or both); the remedial authority of the appellate panel; the possibility of remand of the award to the original panel or to a different panel; and the handling of costs, including the potential shifting of costs if an appeal is unsuccessful.²³² Given the transaction costs associated with their formulation, fully customized appellate rules are probably feasible only in exceptional cases (such as long-term relationships or large-scale business transactions). In most cases, parties will probably want to rely on existing institutional models.²³³

E. *Select Service Providers that “Get It”*

1. Dispute resolution institutions

An administrative framework for arbitration (as well as preliminary steps, notably mediation) is among the most critical choices made by parties drafting dispute resolution agreements. While arbitration need not be “administered,” many business parties prefer to incorporate the rules of an administering institution or “provider organization” in their agreement. Whether to seek administration and the selection of

229. See, e.g., *Cummings v. Future Nissan*, 128 Cal.App.4th 321 (Cal. Ct. App. 2005) (affirming lower court order confirming award by appellate arbitrator).

230. See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 299-300.

231. See INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION CPR ARBITRATION APPEAL PROCEDURE (1999); JAMS ARBITRATION APPEAL PROCEDURE (2003), available at <http://www.jamsadr.com/rules/optional.asp>.

232. See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 298-304. See also Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60 DISP. RESOL. J. 10 (2005).

233. See *supra* Part II.B.5.

an administrative framework should depend on the client's needs and specific circumstances.

By incorporating institutional arbitration rules in their agreement, parties establish guidelines for conduct of the processes: a "safety net" of default rules that come into play in the absence of a contrary agreement. Rules plug users into an administrative framework that normally includes support staff to help select arbitrators and facilitate other aspects of arbitration, and a panel or stable of neutrals from which arbitrators can be selected for specific cases. Rules normally establish a right to, and mechanism for, payment of service providers, and tend to reinforce arbitral immunities. The scope of administrative support, however, varies greatly among institutions, from very limited support (as in the CPR Rules, which limit CPR involvement to appointing arbitrators where required) to ICC-style administration.²³⁴

Although administrative services typically entail fees and costs, at least two elements are probably indispensable for most parties: a ready-made set of procedures (obviating the need to draft) and an authority designated to appoint arbitrators in the absence of agreement.²³⁵ Beyond this, not all parties need the same level or kind of administrative support. Depending on a party's goals, different questions should be considered when selecting an administering institution.

Parties seeking cost savings, efficiency, and avoidance of undue delay might consider the following:

- Does the institution offer mediation services, or other ADR services (such as nonbinding advisory opinions), that might be useful in settling disputes before resorting to binding arbitration?
- If the size and complexity of possible disputes under a contract is likely to vary, is more than one set of arbitration procedures necessary? Would expedited arbitration procedures be beneficial for certain classes of disputes? Does the institution publish such rules? What other procedures, such as provisions for a pre-hearing conference, may promote economy and efficiency?²³⁶
- If, as is usually the case, the parties need assistance in selecting arbitrators, does the institution sponsor a panel or list of arbitrators? If so, does the list include competent arbitrators who are nearby? Are the people on the panel noted for their ability to manage hearings quickly and efficiently? If a mix of expertise is appropriate, are arbitrators of relevant expertise available through the institution?

234. CPR RULES, *supra* note 35, at R. 6.

235. See *id.*; UNCITRAL MODEL LAW ON INT'L COMMERCIAL CONCILIATION (2002), available at www.uncitral.org [hereinafter UNCITRAL MODEL LAW].

236. See *infra* Part II.E.5.

- Will efficiency be best served by having minimal administration (in which the administering institution's functions are limited to providing a set of procedures and serving as an appointing authority), thereby relying on arbitrators to manage the proceeding unaided? Alternatively, is a separate administrative entity necessary to: set up initial meetings; handle correspondence; supervise the reimbursement of arbitrator fees and expenses; and ensure the award is final, complete, and in proper form? What functions does the administering institution offer, and what is the reputation of its staff for providing prompt and competent service?

2. Individual neutrals

It has been said that “the arbitrator *is* the process.”²³⁷ This is not mere hyperbole. While the appropriate institutional and procedural frameworks are often critical to crafting better solutions for business parties in arbitration, the selection of an appropriate arbitrator or arbitration tribunal is the most important choice confronting parties in arbitration.²³⁸ A misstep in the choice of arbitrators may undermine many other good choices.

An arbitral institution should never be chosen without ascertaining whether the institution's panel or list of neutrals have the requisite experience, abilities, and skills. To inform and channel the eventual selection process, moreover, it may be appropriate to prepare reasonable guidelines for the choice of neutrals for particular kinds of disputes. In considering candidates, some or all of the following may be relevant: legal, professional, commercial, or technical background; notability;²³⁹ hearing management experience and skills, attitudes about arbitration; and current schedule and availability.

Again, the relevant questions depend on goals and priorities. If those priorities include low cost, efficiencies, and the avoidance of undue delay, the following queries may be helpful:

237. See, e.g., Stipanowich, *Rethinking*, *supra* note 95, at 478.

238. JAY FOLBERG, ET AL., *RESOLVING DISPUTES—THEORY, PRACTICE & LAW* 470-73 (2008) (“the choice of arbitrators [is] critical for two reasons: They will likely provide the only review of the case's merits, and arbitrators will have primary control over the process itself.”).

239. Notability may be especially desirable if familiarity with the norms and practices of the industry is needed. *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551-52 (2d Cir. 1981) (“The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose.”); Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator*, 60 *DISP. RESOL. J.* 24, 27 (2005) (prominence of arbitrator increases confidence in the process).

- Would a single arbitrator be sufficient for select classes or kinds of disputes?²⁴⁰
- Does the prospective arbitrator (or chair of the arbitration tribunal) have experience in process management, and does that experience reflect well on that arbitrator's ability to supervise an efficient, economical process?
- Is the prospective arbitrator committed to the concept of promoting economies and efficiencies throughout the process?
- Is the prospect available for expedited hearings or for hearings over the coming months?

It is reasonable for parties to expect arbitrators to give them what they bargained for.²⁴¹ While arbitrators should always seek to promote efficiency and economy in the absence of a contrary agreement, clear contractual language emphasizing the primacy of such expectations should give rise to special effort on their part.²⁴²

Arbitrators may promote economy and efficiency in many ways, including:

- Making expectations about speed and cost-saving clear at the outset of the process by emphasizing the firmness of the schedule and granting continuances only for good cause;²⁴³
- Functioning as role models (cooperating with other arbitrators, including party-arbitrators; avoiding scheduling conflicts whenever possible);²⁴⁴
- Actively managing the process, beginning with a pre-hearing conference resulting in an initial procedural order and timetable for the entire arbitration;²⁴⁵
- Simplifying arrangements for communication, including the elimination of unnecessary communications through case administrators or third parties;²⁴⁶
- Simplifying, clarifying, and prioritizing issues;²⁴⁷
- Addressing jurisdictional issues and reasonable requests for interim relief as soon as practicable;²⁴⁸
- Facilitating and actively monitoring information exchange/discovery;²⁴⁹

240. H. Henn, *Where Should You Litigate Your Business Dispute? In an Arbitration? Or Through the Courts?* 59 DISP. RESOL. J. 34, 37 (2004); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 46.

241. See John Tackaberry, *Flexing the Knotted Oak: English Arbitration's Task and Opportunity in the First Decade of the New Century*, SOC'Y OF CONSTRUCTION L. PAPERS, May 2002, at 3.

242. See *supra* text Part III.B., III.C.

243. See Chang, *supra* note 138; COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 215-20.

244. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 6-8.

245. CCA GUIDE TO BEST PRACTICES, *supra* note 139, at 8, 17, 33-37.

246. *Id.* at 88.

247. *Id.*

248. *Id.* at 82, 104, 106.

249. *Id.* at 87.

- Employing electronic means of communication and document management as appropriate;²⁵⁰
- Scheduling hearings with as few interruptions as possible;²⁵¹
- Planning and actively managing the hearings (beginning and ending each hearing day with housekeeping sessions);²⁵² and
- Anticipating potential problems (such as the unavailability of witnesses, unanticipated circumstances) and seeking creative solutions to minimize delay.²⁵³

3. Dispute resolution counsel

An international organization recently sponsored a competition among major law firms with the aim of identifying a firm whose practice embodied effective methods of managing and resolving business-related disputes.²⁵⁴ The entries revealed very different conceptions of what constitutes effective dispute resolution. Some firms simply touted big court victories and others focused on their expertise in commercial arbitration. Still others portrayed a varied practice employing different approaches, including early case assessment, negotiation, mediation, arbitration, and litigation to address particular client needs.

Business clients often rely heavily on outside counsel to represent their interests in the management of conflict, including arbitration. These advocates have as much to do with the realization of a client's goals and expectations as procedures, administrative framework, or neutrals. The wide variation in approaches to conflict inevitably means some law firms—and lawyers—will be more suitable for particular clients—and particular circumstances—than others. Selection of a law firm or lawyer that lacks the willingness or capability to align itself with the client's goals may undermine the most careful contract planning.

Unless a legal dispute is inevitably destined for the courtroom, something beyond litigation experience is essential in outside counsel. Litigation experience is not in itself sufficient to qualify one as arbitration counsel—the legal and practical differences are simply too great. Moreover, as our discussion of varied client goals reveals, arbitration and court trial are very often appropriately relegated to a secondary or tertiary role, forming a backdrop or backstop for efforts at informal

250. CCA GUIDE TO BEST PRACTICE, *supra* note 139, at 121.

251. *Id.* at 153.

252. *Id.* at 133.

253. *Id.* at 94.

254. The author was among the judges.

dispute resolution.²⁵⁵ With that in mind, counsel should ensure they are capable of understanding and fulfilling a client's specific goals and priorities in addressing disputes. Consider the following list of questions that might be asked before retaining counsel to resolve a dispute:

- Do you have experience helping clients consider the appropriateness of options for early resolution of disputes? What options do you discuss?
- What methods do you use to analyze options?
- Do you undertake such analyses prior to commencing discovery?
- What is your experience with, and attitude toward, negotiated resolution of disputes? With mediated negotiation?
- Have you had formal training in negotiation or mediation theory and practice?
- What is your experience with commercial arbitration, including arbitration under the relevant procedures and administrative framework?²⁵⁶ Are you familiar with the case managers or case administrators for this matter?
- Are you familiar with the provider institution's list of arbitrators?
- Are you familiar with applicable ethics rules, if any?
- How does your arbitration advocacy differ from your advocacy in litigation?
- What techniques have you found to be most effective in promoting efficiency and economy in commercial arbitration?
- What experience have you had negotiating, arbitrating, or litigating with opposing counsel? What is the nature of your relationship?
- What professional service models do you employ other than hourly fees? Are you willing to explore incentives for early settlement?

Even after vouchsafing the role of advocate to appropriate outside counsel, a prudent client or inside counsel will continue to be involved in the conflict resolution process. This means being present at key decision points before and during arbitration, including pre-hearing conferences, during which the timetable and format for the arbitration are discussed and established.²⁵⁷

255. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 5-6, 10-33, 39-41.

256. Depending on the circumstances, this might include an exploration of experience with expedited rules; rules for large or complex arbitration, or appellate arbitration rules.

257. See Casey & Parker, *supra* note 147; COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 183-90.

IV. CONCLUSION

Choice—the opportunity to tailor procedures to business goals and priorities—is the fundamental advantage of arbitration over litigation. The freedom to choose, and key resulting differences between contract-based arbitration and court trial, explain why most business users prefer arbitration when resolving commercial disputes.²⁵⁸ For the same reason, it is hard to understand why many users are so vocal in their criticism of arbitration.

Business users who have reason to complain about the arbitration experience should look first and foremost to the choices they made—or failed to make—from the inception of contract planning through the arbitration process. For those who place high value on economy and efficiency in arbitration, the return to fundamentals should begin with identification of key client goals and priorities, and seeking or formulating a process amenable to those ends. Choice-making should also take into account emerging templates for streamlined processes, and for limitations on the scope of discovery. Those concerned about limitations on the judicial scrutiny of awards should carefully consider their options, and forego the problematic and costly avenue of expanded judicial review in favor of alternatives such as appellate arbitration. Finally, users should employ greater discernment in selecting those service providers who are primary determinants of the arbitration experience: administering institutions, arbitrators, and advocates. For in the increasingly sophisticated world of conflict management choices, knowledge, experience, and sound judgment are more critical than ever.

258. See *supra* note 3.